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SUPREME COURT U.S.
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No. 232.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1881.

PHŒNIX MUTUAL LIFE INSURANCE COMPANY,
Plaintiff in Error,

vs.

CAROLINE R. DOSTER ET AL.,
Defendants in Error.

BRIEF OF H. E. BARNARD,
Attorney for Plaintiff in Error.

John J. Daly & Co., Stationers and Printers, 211 N. Third Street, St. Louis.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1881.

PHŒNIX MUTUAL LIFE INSURANCE COMPANY,
Plaintiff in Error,
vs.
CAROLINE R. DOSTER ET AL.,
Defendants in Error.

STATEMENT.

This action is founded upon a certain insurance policy, issued by the plaintiff in error upon the life of Jackson Riddle, of which the following is a copy:

PHŒNIX MUTUAL LIFE INSURANCE COMPANY.
HARTFORD, CONN.

Age, 48 years.] [Annual premium, $215.00

Term: Life. Annual payments.

No. 56960.] [$5,000

This policy of assurance witnesseth that the Phœnix Mutual Life Insurance Company, of Hartford, Conn., in consid-

eration of the representations made to them in the application for this policy, and the sum of two hundred and fifteen dollars and cents, to them duly paid by Mary J. Riddle, wife and children, and of the annual payment of a like amount on or before the twentieth day of September in every year during the continuance of this policy, do assure the life of Jackson Riddle, of Monticello, in the county of Piatt, State of Illinois, in the amount of five thousand dollars, for the term of his natural life.

And the said company hereby promise and agree to pay the amount of the said insurance at their office in the city of Hartford, Connecticut, to his wife and children, or their executors, administrators, or assigns, in ninety days after due notice and proof of the death of the said party whose life is hereby insured, any indebtedness to the company on account of this policy being first deducted therefrom.

And the said company do further promise and agree that if, after having received no less than three (3) annual premiums, this policy shall be surrendered while in force, a new policy will be issued for the whole amount of even dollars of premiums received by the said company (subject to any indebtedness on account of premiums,) without subjecting the assured to any subsequent charge, except the interest annually in advance on all indebtedness on this policy.

This policy is issued and accepted by the assured upon the following express conditions and agreements:

First. If the said Jackson Riddle shall at any time during the continuance of this policy, without the consent of the said company previously obtained in writing, visit any part of the western hemisphere lying between the tropics, or of the eastern hemisphere, between the 36th parallel north and the

tropic of Capricorn, or engage in the manufacture or transportation of gunpowder or fireworks, or in submarine operations, or in any military or naval service whatsoever (the militia in actual service excepted) or in case he shall die by the hands of justice, or in, or in consequence of, a duel, or of the violation of any law of these States or of the United States or of any other country which he may be permitted under this policy to visit or reside, or if any of the declarations or statements made in the application for this policy, upon the faith of which this policy is issued, shall be found in any respect untrue, or in case any note given for the cash part of premium on this policy shall not be paid at maturity, or in case the interest is not paid annually in advance on any notes which may be given for any portion of the premium on this policy, then, and in every such case this policy shall be null and void.

Second. If the said premium shall not be paid at the office of the company in the city of Hartford, Connecticut, or to any agent of the company on his producing a receipt signed by the president or secretary, on or before the date above mentioned, then, in every such case, the said company shall not be liable for payment of the sum insured, or any part thereof, and this policy shall cease and determine.

Third. In every case when this policy shall cease and determine, or become or be null and void, all payments thereon shall be forfeited to this company.

This policy to take effect when countersigned by H. H. Koon, agent at Chicago, Illinois.

In witness whereof the said Phœnix Mutual Life Insurance Company of Hartford, Connecticut, have by their president and secretary signed and delivered this contract this twen-

tieth day of September, one thousand eight hundred and seventy-one.

E. FESSENDEN, *President.*

J. F. BURNS, *Secretary.*

Countersigned this twentieth day of September, 1871.

HENRY H. KOON,
Gen'l Agent.

[Fifty cents. 50 United States int'r' revenue. 50.]

PROOFS OF DEATH REQUIRED.

1. A certificate from the physician who attended the party during his last sickness, stating particularly the nature of the disease, its duration, and the time of death.

2. A certificate of a disinterested acquaintance of the deceased, certifying to the time and fact of his death, and that he or she was the person insured by that name in this company.

3. A certificate from the undertaker, sexton or clergyman who officiated at the funeral of the deceased and saw the body interred.

4. A certificate from some intimate friend of the deceased, respecting the continuance of his temperate habits up to the time of death.

These several certificates should be sworn to before a magistrate or other officer qualified to administer an oath or affirmation.

Also a certificate from the Secretary of State or Clerk of Court that the magistrate who administered the oath or affirmation is duly authorized to do so.

The insured will please take notice that no receipt for

premium on this policy is valid unless signed by the president or secretary of the company, at Hartford, Connecticut, and that no agent has authority to receive any premium without first presenting a regularly signed receipt from the president or secretary; or to interline, alter, or otherwise change any policy, or to receive any premium after date of its being due, without special permission from the officers of the company.

The plaintiffs below (defendants in error here) declare upon the policy as a live and existing contract.

In answer to which the plaintiff in error (defendant below) claimed:

1. That said policy ceased and determined before the death of Jackson Riddle, on October 6th, 1876, by reason of the failure of Jackson Riddle and defendants in error (his wife and children) to pay the annual premium which became due thereon on September 20th, 1876, under the *second condition* of the same. And also, that when the same ceased and determined by virtue of the breach of the *second condition*, all premiums theretofore paid thereon were forfeited to the company under the *third condition* of the policy.

2. That it is a mutual life insurance company, and as such has a by-law, duly passed and promulgated, which expressly prohibits any of its agents from varying any condition in any of its policies or contracts of insurance contained, either orally or by writing, and that the said Jackson Riddle and defendants in error had notice of the existence and import of said by-law.

3. That its agents were agents with limited powers, and were prohibited under their authority from waiving any conditions of its said policies of insurance, either orally or by

writing, and were restricted from altering, modifying, or discharging any contract, or waiving any forfeitures, &c.; and that Jackson Riddle and the defendants in error were duly notified by a notice thereon printed in conspicuous letters to that effect, and of the limit of the authority of such agents.

The defendants in error (plaintiffs below) admit:

1. The existence of the second and third conditions as pleaded in the answer, and the breaches thereof, but deny the existence of the by-laws pleaded, and that the defendants in error or Jackson Riddle had any notice of their existence or terms.

2. They allege a waiver of the second and third conditions of the policy, and charge that for a good and sufficient consideration plaintiff in error agreed to give to the said Jackson Riddle and defendants in error a reasonable time after the 4th day of October, 1876, in which to pay said annual premium. That defendant in error did, within a reasonable time thereafter, to wit: October 9th, 1876, tender to plaintiff in error the amount of said premium, but it wholly refused to accept the same.

3. That the plaintiff in error for a good and sufficient consideration agreed to give Jackson Riddle and defendants in error notice of the time, place and amount of payment due as the premium on said policy for the year 1876, but failed to do so until October 4th, 1876, and that immediately after receipt of said notice the amount was tendered and refused.

4. That the amount due from said Riddle to the plaintiff in error, on September 20th, 1876, was not the sum of $215, but a less amount; and that said Riddle and defendants in error were entirely ignorant of the amount due until the

aforesaid notice was received. That said Riddle and defendants in error were ready and willing, and would have paid said amount so due at any time the plaintiff in error might have notified and informed him or them of said amount.

5. That the reason the premium of $215, due September 20th, 1876, was not paid, was that the agents of plaintiff in error, by a uniform course of dealing with said Riddle and defendants in error, had induced him and them to believe that payment of said premium on said day would not be required. That the agent of plaintiff in error, through whom this insurance was effected, told Jackson Riddle that it would make no difference about the payment of premiums on the day of payment specified in said policy. That it was well known to the said Riddle and defendants in error that it was the uniform custom of plaintiff in error to accept from all its policy holders payment of their premiums long after they became due, without any terms or conditions whatever.

That annual premiums due on this policy September 20th, 1872, was not paid till October, 1872.

That annual premiums due on this policy September 20th, 1873, was not paid until September 30th, 1873.

That annual premiums due on this policy September 20th, 1874, was not paid until some time in October, 1874.

That annual premiums due on this policy September 20th, 1875, was not paid until October 9th, 1875, and was then paid to plaintiff in error's general agent in Chicago, Illinois.

6. That it was the uniform and invariable custom and habit of plaintiff in error to notify said Jackson Riddle, *by mail*, several days before the 20th day of September each year, the amount of profits due him, and the balance, after deducting the same, which they were required to pay in cash,

and the place at which and the person to whom said cash could be paid.

7. That although the terms of the policy provided that the premiums should be paid at plaintiff in error's home office in Hartford, Connecticut, yet neither defendants in error nor Jackson Riddle were ever required to pay there, but were always notified to pay the premium due to some agent.

8. That they relied upon such uniform custom to notify them *by mail*, and believed that the plaintiff in error would not seek to forfeit or annul said policy until the said Jackson Riddle had been notified *by mail*, and reasonable time thereafter had elapsed for him or the defendants in error to make payment of the cash portion of said premiums.

9. That said Riddle resided at the town of Oxford, Benton County, Indiana, for a long time prior to the 20th day of September, 1876, until his death; and that plaintiff in error did not notify him, nor any of the defendants in error, of the time, amount and place of payment of the premium due on September 20th, 1876.

10. That on October 4th, 1876, plaintiff in error mailed to Jackson Riddle, a letter of that date, addressed to him at Fowler, Indiana, which was not his residence, which it well knew, notifying him of the cash amount of premium, etc., and stating that it would receive the same if paid within a reasonable time, which letter was not received by said Jackson Riddle, but was received, opened and read by one of the defendants in error, and the offer, proposition and agreement therein made was accepted in the life time of said Jackson Riddle.

11. That tender of premium was made and refused on the 9th day of October, 1876.

Upon the issues thus made, the case was tried by the court and a jury empannelled therein. At the conclusion of the plaintiffs' case, defendant demurred to the evidence, which demurrer was by the court overruled an exception to such ruling saved, and no testimony introduced by defendant. Then instructions were asked by the parties and given in part and refused in part. To the action of the court in refusing certain of defendant's instructions and giving of plaintiffs' instructions, defendant saved an exception. The defendant also saved an exception to portions of the charge given by the court to the jury in this case. The verdict of the jury was for plaintiff for the sum of $5,077.06.

Afterward a motion for a new trial was filed within time, overruled by the court, bill of exceptions filed at the trial term, and case brought into this court by writ of error.

During the trial the following notices, among others, were produced. (On the part of defendants in error):

"UNITED STATES OF AMERICA:

In Circuit Court for District of Kansas.

CAROLINE R. DOSTER, MARY J. RIDDLE, TAYLOR RIDDLE, LEON H. RIDDLE, IRMA M. RIDDLE and FRANK RIDDLE, the three last named being minors, who sue by their next friend, CAROLINE R. DOSTER,

Plaintiffs,

vs.

THE PHŒNIX MUTUAL LIFE INSURANCE COMPANY, of Hartford, Conn., Defendant.

} Demand for production of documents.

To the above named defendant and your attorney of record:

You are hereby notified to have and produce upon the trial

of the above-entitled cause, at the next ensuing term of the court aforesaid, the originals of the letters, books and papers herein described, so that plaintiffs may read the same in evidence on said trial: The registers of renewals kept by H. H. Koon, general agent of Phœnix Mutual Life Insurance Company, of Hartford, Conn., at Chicago, Ill., and by A. G. Fowler, superintendent of agencies, at Chicago, Ill., for the years 1872, 1873, 1874, 1875 and 1876; the application of Jackson Riddle, made at Montecello, Ill., through W. G. Herron, agent of the Phœnix Mutual Life Insurance Company, of Hartford, Conn., for life insurance in said company, and on which said application there was issued to said Jackson Riddle life policy No. 56960; the four premium notes given by said Jackson Riddle to said company, in part payment of his premiums on said policy under the half-note plan; the letter written to A. G. Fowler, superintendent of agencies of said company, at Chicago, Ill., in the month of September or October, 1875, by W. G. Herron, of Montecello, Ill., in which said letter was enclosed draft of $165.41 in payment of Jackson Riddle's premium on his policy No. 56960, due September 20, 1875, and in which letter Mr. Fowler was notified by Mr. Herron that said Jackson Riddle had removed from Montecello, Ill., to Oxford, Inidana, May 18th, 1878.

FRANK DOSTER,
Attorney for Plaintiffs.

STATE OF CONNECTICUT,
County of Hartford.

HARTFORD, May 24, 1878.

I hereby acknowledge that service of the foregoing notice

and demand was made on me by delivery of a true copy thereof, this 24th day of May, A. D. 1875.

J. M. HOLCOMBE,
Secretary.

It is agreed that this demand shall be good for the present November term, and the originals need not be produced, but that the copies attached to depositions now on file may be used with or without the depositions to which they are attached, and such presentation of said exhibits and copies shall be in full compliance with this demand and notice on part of defendant and plaintiffs, November 28th, 1878.

FRANK DOSTER,
Attorney for Plaintiffs,

H. E. BARNARD,
Attorney for Defendant."

(On the part of the plaintiff in error.)

"In the Circuit Court of the United States for the District of Kansas.

CAROLINE R. DOSTER, MARY J. RIDDLE, TAYLOR RIDDLE; and LEON H. RIDDLE, age 13 years, IRMA M. RIDDLE, age 9 years, and FRANK RIDDLE, age 5 years, minors, who sue by their next friend, CAROLINE R. DOSTER, Plaintiffs,

vs.

THE PHŒNIX MUTUAL LIFE INSURANCE COMPANY, of Hartford, Connecticut, Defendant.

Notice to produce papers.

To the above named plaintiffs and your attorneys of record:

You will take notice that the defendant demands and requires you to produce on the trial of this cause, that the same may be introduced in evidence by the defendant, the following papers, to wit:

A written and printed notice mailed by defendant's agent to Jackson Riddle, at Monticello, Illinois, from the post office at Chicago, Illinois, on or about August 25th, 1876, and which said notice advised and notified Jackson Riddle of the time when and amount due as the premium upon a certain policy of insurance upon his life in the defendant company, which notice stated that the premium on said policy would be due and payable on the 20th day of September, 1876, and that the amount of said premium was $165.41.

Also another certain written and printed notice mailed from the post office at Chicago, Illinois, by defendant's agent to Jackson Riddle, at Fowler, Indiana, on or about the 7th day of September, 1876, advising and notifying him of the time when and the amount due from him to defendant company, which said notice stated that the premium on said policy was due on September 20th, 1876, and that the amount was $165.41, and that unless the above notices are produced as requested. the defendant will offer, upon the trial of this cause, evidence to prove the contents and reception of both of the same.

H. E. BARNARD,
Attorney for Defendant.

STATE OF KANSAS, }
County of Shawnee. } ss.

I, H. E. Barnard, a citizen and resident of Missouri, on oath, state that I am one of the attorneys of record in the above case, and that I served upon Frank Doster, one of the attorneys of record for the plaintiffs in the above entitled case, a notice, of which the above is a true copy, on this 26th day of November, 1878, by delivering said notice to him in person in the city of Topeka, Shawnee County, State of Kansas.

H. E. BARNARD.

Subscribed to in my presence and sworn to before me this 26th day of November, 1876.

[SEAL.] HOWELL JONES,
Notary Public."

ERRORS ASSIGNED.

The plaintiff charges that the court erred—

1. In admitting the following testimony of W. G. Herron, offered by plaintiffs as evidence on trial of this case, over the objection of defendant, "that witness was not agent of company at that time, and nothing done by him could bind defendant. And because the question calls for secondary evidence."

"Ques. State whether, in your letter, you informed the company or its agent of the residence of Jackson Riddle? Ans. I informed the company to send his receipt to Oxford, Indiana—that he lived there, and to communicate with him there."

"Ques. State if he sent back any premiums to you from Oxford, Indiana, for the company; and if so, when was it? Ans. I received a draft and sent it to the company. It was for the renewal of his premium for that year. I received it in September."

2. In admitting the following testimony of W. G. Herron, offered by plaintiffs as evidence on the trial of this case, over the objection of the defendant, "that it is secondary evidence; no sufficient foundation for the introduction of same having been laid."

"Ques. State the full contents of that letter? Ans. I wrote—I think that he lived at Oxford, Indiana—and for them to communicate with him there."

"Ques. State if you gave any directions in the second letter where to send the receipt? Ans. I don't think I did; that's my impression now."

3. In admitting the following testimony of W. G. Herron, offered by plaintiffs as evidence on the trial of this case, over the objection of the defendant, "that the same was incompetent and immaterial, no authority of agent having been shown."

"Int. 19. State what was your general custom, as agent of the company, in collecting overdue premiums? Ans. My custom was to receive them, if paid in person, in a reasonable time."

"Int. 20. State to whom you remitted overdue premiums when collected? Ans. To Mr. Koon, the general agent at Chicago."

"Int. 21. State whether Mr. Koon received those overdue premiums from you, and what, if anything, did he write or say concerning their collection after they became due? Ans. He received them. I don't know that he said anything particular, unless they run an unreasonable time."

"Int. 22. State whether he ever refused to accept any of them because they were overdue? Ans. He has refused to accept some overdue that had run a considerable time without a physician's certificate of health. I don't know that a physician's certificate of health was ever required of Jackson Riddle."

"Int. 27. State if you know whether Jackson Riddle understood from the conversation that you had with him concerning the acceptance by the company of overdue premiums, and from the reception of overdue premiums from himself, that he could pay his premiums to the company or to its agents within a reasonable time after they became due? Ans. I think he might have so understood it from myself, as

agent. I think he understood from myself that *he* could pay me overdue premiums and the company would receive them."

"Int. 7. Did you, in that letter, make any representations as to Jackson Riddle's health? Ans. No, I think not; I think I gave the address of Jackson Riddle in that letter at Oxford, Indiana. I think I said to the company to send Mr. Riddle's receipt to Oxford, Indiana, and hereafter to communicate or draw on him there; I think I said that that was his residence. There may have been more in the letter, but I cannot say now."

4. In admitting the following testimony of G. H. Hubbell, offered by plaintiffs as evidence on the trial of this case, over the objection of the defendant, "that same was incompetent and irrelevant, no agency or authority having been shown."

"Int. 7. What was your custom as to the collection of past due premiums? Ans. We received them whenever they were paid. We did receive them after they became due from three days to more than two months after they became due. We remitted the premiums after paid to the general agent at Chicago. We did not notify him when we received the money. We never had anything to do with Jackson Riddle's insurance.

5. In admitting the testimony of L. D. Hawley, offered by plaintiffs as evidence on the trial of this case, over the objection of defendant, "that nothing therein contained was relevant or competent evidence in this case, for the reason that the draft concerning which he testifies does not appear to ever have been in the possession of the defendant or any of its agents, and therefore the whole of said testimony is irrelevant, because he testifies concerning nothing except the issuance of that draft."

6. In admitting the following testimony of Orne Templeton, offered by plaintiffs as evidence, on the trial of this case, over the objection of the defendant: "That the question calls for a conversation between witness and one of the plaintiffs, not claimed to have him held in the presence of the defendant or any of its agents, and therefore inadmissable for any purpose in this case."

"Ques. I'll ask you to state what conversation occurred between you and Mr. Riddle (meaning Taylor Riddle) on that trip? Ans. I remembered that Jackson Riddle had a life insurance policy. I asked Taylor in regard to the policy on the way to Lafayette, and he answered me by saying that he had, and that he also had received a notice of one of the premiums being due. He took it out of his pocket and handed it to me to read, but it was so dark in the car that I could not read it."

7. In admitting the following testimony of Caroline R. Doster, one of the plaintiffs, offered by plaintiffs as evidence on the trial of this case, over the objection of the defendant; that it is irrelevant and incompetent, and calls for a conversation between the deceased and one of the plaintiffs, at which it is not claimed that either the defendant, or any of its agents were present.

"Ques. State, whether while there, you had any conversation with Jackson Riddle relative to the payment of a premium due by him upon a policy held by him in the defendant's company? Ans. I had."

"Ques. What was that conversation? Ans. About the 9th of September, I think, just previous to his leaving home, he spoke to me that he didn't know the exact amount due, as the premium increased for a certain number of years, and

then decreased for another certain number of years; that he was expecting a notice which we would probably receive in his absence, and desired that if such notice came, that I should take it to my brother at Fowler, Indiana, and have him buy a draft and remit the amount to the company at Chicago, Illinois, which I promised to do."

"Ques. Where was that conversation had—what were you doing there and how long did you remain? Ans. I had the conversation at Oxford, Benton County, Indiana, which was his residence. I was visiting there, and remained until the second day of October, 1876. While I was there, no notice of the amount of premium due from him was received to my knowledge. I think if any had been received I would have known it, as I had been given charge of the matter spoken of before, and it would have been my business to inspect the mail received in my father's and brother's absence. I mean by my brother, Taylor Riddle."

8. In admitting the following testimony of Frank Doster, witness for plaintiffs on trial of this case, over the objection of the defendant, "that witness is asked to testify to the contents of the books of defendant, which are in writing and the best evidence, no foundation having been laid for secondary proof."

"Ques. I will ask you to look at that (handing witness Exhibit B, attached to witness Fowler's second deposition), examine it, and state in what respect the books differ from that copy there. Ans. It differs in this respect, that when I made the examination of the column—the right hand column on the page—nothing under the word remarks was there. The words 'reported in the month of,' as it is in the copy, was not there.'

9. In admitting the following testimony of Taylor Riddle, witness for plaintiffs on trial of this case, over the objection of defendants, "that it is incompetent because the arrangement was the result of the conversation between the deceased and one of the plaintiffs, at which conversation neither defendant nor any of its agents was present."

"Ques. State if you had a conversation with your father relative to his policy or payment of any premiums at the last time you saw him? Ans. Yes, sir, I did."

"Ques. State—I don't ask you for the conversation—but state what arrangement, if any, was made between you and your father relative to the payment of any premiums on his policy and what premium, if any, it was? Ans. An arrangement was made between he and I that the premium for 1876 was to be paid by me. The premium for 1876 was to be paid by me, by an arrangement of Jackson Riddle and myself."

"Ques. Well, sir, I will ask you to state whether you had the money or were subsequently to get the money to pay with? Ans. Yes, sir, I had the money at the time the arrangement was made."

10. In admitting the following testimony of Taylor Riddle, witness for plaintiffs, on the trial of this case, over the objection "that witness is asked to give contents of written or printed matter without having first laid foundation for secondary evidence."

"Ques. What was on the poster? Ans. I think the substance of the poster is this: You can pay this premium to A. G. Fowler, Chicago, or remit direct to this office."

11. The plaintiff further charges that the court erred in overruling defendant's demurrer to the evidence.

12. In refusing to give the following proper and legal instructions urged by defendant:

"Second. That if the jury believe from the evidence that Jackson Riddle was possessed of certain education, enough to read printing, and if the jury believe from the evidence that the policy and renewal receipts received by Jackson Riddle contained upon them a notice stating the powers of William G. Herron, that any statement made by William G. Herron to Jackson Riddle, beyond the scope of the powers contained in this notice, he was under no obligation to accept and these statements do not bind the company.

Third. That from the evidence in this case there is no evidence that William G. Herron ever was the agent of the Phœnix Mutual Life Insurance Company other than its sub-agent, under a contract between William G. Herron and H. H. Kohn, as general agent, and that the testimony in this case shows that the officers of this defendant never had any knowledge of Mr. William G. Herron even being a sub-agent.

That the court will instruct the jury that the evidence in this case does not show that the company ever had any correspondence with William G. Herron; that they never sent from their office any renewal receipt to William G. Herron; that they never had any correspondence with said Herron; that they never knew, except through their general agent at Chicago, that said Herron even acted as a sub-agent; that said renewal receipts were never entrusted to him by the officers of the defendant, but were always sent to defendant's general agent in Chicago, and to render said renewal receipts valid they were in every event to be countersigned by defendant's general agent in Chicago; and that all of said renewal receipts were countersigned by defendant's

general agent in Chicago before they were delivered to Jackson Riddle, or to William G. Herron and by him to Jackson Riddle.

Fifth. That the jury will totally disregard all evidence in this case tending to show any custom with this defendant other than the custom is brought home to the knowledge of Jackson Riddle; all customs, general or special, with other parties, unless that custom was brought home to the knowledge of Jackson Riddle.

Sixth. That the jury will totally disregard all evidence in this case which tends to show any act on the part of anybody tending to show a waiver of any premium upon the policy of Jackson Riddle other than that which fell due on the 20th day of September, 1876.

Eighth. The court will instruct this jury that if the defendant, by its agent at Chicago, mailed, postage prepaid at Chicago, a notice or notices of the time when the premiums for the year 1876 became due, and directed to Jackson Riddle, at the postoffice which they had good reason to believe was his postoffice, and Jackson Riddle did not receive these notices, that that is no excuse for his not paying the premium on the 20th day of September, when it became due.

Tenth. That from the 20th day of September, 1876, forward, until the time of the death of Jackson Riddle, the policy sued upon in this case was not in force; that it had expired by its terms on the 20th day of September, and that Jackson Riddle himself took the risk of his dying between that time and the time of the tender; and that if the jury further believe that Jackson Riddle had been misled by the former leniency of this company towards him, and had been led to believe that he need not pay the premium when it be-

came due, but might pay it a few days thereafter, as he had been accustomed to paying before, and that if the premium was not tendered until after his death, and was refused by this company, the jury will return a verdict for the defendant.

Twelfth. That the court instructs the jury that the intent on the part of Jackson Riddle to pay this premium for the year 1876, not brought home to the knowledge of the defendant, is not competent evidence in this case, and should be disregarded by the jury."

13. In giving the following improper instructions asked by plaintiff, to-wit:

"If, therefore, the conduct of the company in its dealings with the assured in this case and with others similarly situated has been such as to induce a belief on his part that so much of the contract as provides for a forfeiture, if the premium be not paid on the day it is due would not be enforced if payment were made within a reasonable period afterwards, the company ought not, in common justice, to be permitted to allege such forfeiture against one who has acted upon the belief and subsequently made or tendered the payment. And if the acts creating such belief were done by the agent and were subsequently approved by the company, either expressly or by receiving and retaining the premiums, with full knowledge of the facts, the same consequences should follow."

"Therefore, if you find from the evidence in this case that the defendant company were in the habit of sending renewal receipts for the premium on this policy to its local agent, William G. Herron, at the place of residence of the assured, duly signed by the president and secretary of the company, leaving their use subject entirely to the judgment of the local

agent, and the said agent was accustomed to receive from the assured, without objection, the premiums on said policy several days after the same became due and issue the receipt therefor, and the home company, or the managing agents or officers had full knowledge of such practice of the local agent, and received from its agent such premiums so received, and retained the same, the assured had a right to believe that the company waived a strict compliance, and you may find that there was a waiver by the company of the forfeiting clause of the policy; and if the assured, relying on such practice, within a reasonable or the usual time, paid or offered to pay said premium after the day the same was due, the said policy remained in full force and effect, and the company are liable thereon, notwithstanding the assured had died in the meantime."

"Now, I instruct you that if you find from the evidence in this case that it had been the invariable custom of the company to transmit to the assured by mail or by its local agent, a statement of the amount of the premium due, after deducting the dividend, with a notice of the time when, the place where, and person to whom said premium could be paid, then the assured had good reason to expect and rely on such statement and notice being sent to him, and if the insurance company, by its managing agent, had notice of the post office address of the assured before the usual time of sending out such notice, but failed and neglected to transmit such statement and notice to the assured, at his post office address, until the fourth day of October, and the same did not reach the assured or beneficiary under the policy until October 6th, and that the assured or beneficiaries were ready and waiting to pay said premium when said notice and state-

ment should be received, and by reason of such failure of the company to send such notice and statement, and by reason of that alone, the premium due in September, 1876, on said policy was not promptly paid, and that in a reasonable time thereafter, to wit, on Monday, the ninth day of October, 1876, the beneficiaries tendered to the company, at Chicago, the full amount of the premium due them, said policy did not lapse or become forfeited notwithstanding the premium was not paid on the day named in the policy, and notwithstanding the assured had died on the sixth day of October, 1876."

14. The court erred in giving the following in charge to the jury upon its own motion, to-wit:

"Now, the premium due on this policy September 20th, 1876, was not paid when due, and the important question for you to determine is whether or not the insurance company, or its agent authorized so to do, did waive a strict performance of the contract in this behalf, and in considering that question the general practice of the company in this respect may be taken into consideration.

If, therefore, the conduct of the company in its dealings with the assured in this case, and with others similarly situated, has been such as to induce a belief on his part that so much of the contract as provides for a forfeiture, if the premium be not paid on the day it is due, would not be enforced if payment were made within a reasonable period afterwards, the company ought not, in common justice, to be permitted to allege such forfeiture against one who has acted upon the belief, and subsequently made or tendered the payment. And if the acts creating such belief were done by the agent, and were subsequently approved by the company, either expressly or by receiving and retaining the premiums with full

knowledge of the facts, the same consequences should follow. Therefore, if you find from the evidence in this case that the defendant company were in the habit of sending renewal receipts for the premium on this policy to its local agent, Wm. G. Herron, at the place of residence of the assured, duly signed by the president and secretary of the company, leaving their use subject entirely to the judgment of the local agent, and the said agent was accustomed to receive from the assured without objection, the premiums on said policy several days after the same became due, and issue the receipts therefor, and the home company or its managing agents or officers, had full knowledge of such practice of the local agent, and received from its agent such premiums so received and retained the same, the assured had a right to believe that the company waived a strict compliance, and you may find that there was a waiver by the company of the forfeiting clause of the policy, and if the assured, relying on such practice, within a reasonable or the usual time, paid or offered to pay said premium after the day the same was due, the said policy remained in full force and effect, and the company are liable thereon, notwithstanding the assured had died in the meantime.

Now, I instruct you, that if you find, from the evidence in this case, that it had been the invariable custom of the company to transmit to the assured by mail or by its local agent a statement of the amount of the premum due, after deducting the dividend, with a notice of the time when, the place where, and the person to whom said premium could be paid, then the assured had good reason to expect and rely on such statement, and notice being sent to him, and if the insurance company by its managing agent, had notice of the postoffice

address of the assured before the usual time of sending out such notice, but failed and neglected to transmit such statement and notice to the assured at his postoffice address until the 4th day of October, and the same did not reach the assured or beneficiary under the policy until October 6th, and that the assured or beneficiaries were ready and waiting to pay said premium when said notice and statement should be received, and by reason of such failure of the company to send such notice and statement, and by reason of that alone, the premium due in September, 1876, on said policy, was not promptly paid, and that in a reasonable time thereafter, to-wit, on Monday, the 9th day of October, 1876, the beneficiaries tendered to the company at Chicago, the full amount of the premium due, then said policy did not lapse or become forfeited, notwithstanding the premium was not paid on the day named in the policy, and notwithstanding the assured had died on the said 6th day of October, 1876. But if you find from the evidence, that it had not been the uniform custom of the company to send to the assured the said notice and statement at or about the time the premium became due, or if you find that the company or managing agent had not been notified of the change of the postoffice address of the assured until about the said 4th day of October, or that the company had in reality sent such notice by mail or otherwise at a prior date, properly addressed to the assured, then it was not the fault of the company that the assured was not notified, and the want of such notice would not excuse the assured from making payment when the premium became due, September 20th, and the policy would become forfeited. If you find that the policy had not lapsed or become forfeited as before stated, then the plaintiffs are entitled to recover. If,

however, you find that the policy had lapsed or become forfeited, then you will find for the defendant."

The defendant saved an exception to each and every ruling of the court, which is assigned as error above.

15. And last the court erred in overruling defendant's motion for a new trial filed in this case.

BRIEF.

The errors assigned are many, and I will treat them *seriatim* in the brief as numbered in the assignment.

POINTS AND AUTHORITIES.

I.

The demand for production of documents made by plaintiffs upon the trial, upon the defendant, was fully complied with by the defendant (see stipulation, p. 14 of record). In which it was agreed between the parties that the copies produced and attached to the depositions should be *in full compliance* with the demand and might be used by either party.

Therefore the evidence recited in the *first, second* and part of *third* errors assigned, concerning the contents of letters, carries on its face an indication that better remains behind; is clearly secondary, and was most erroneously admitted; when primary evidence of the same fact was agreed to be in the court's files at that minute.

Phillips on Evid., 421.

II.

The evidence mentioned in *third* and *fourth* errors assigned, was entirely incompetent, irrelevant and immaterial, until after authority in Herron and Hubbell to waiver, or knowledge of defendant of waiver, had been shown. There is no evidence tending to show any such authority or knowledge.

Ins. Co. vs. Wolff, 96 U. S., (6 Otto), 326.
Diehl vs. Adams Co. Mu. Ins. Co., 58 Penn. St., 443.
Beatty vs. Lycoming Co. Mu. Insurance Co., 66 Penn. St., 9.
Catoir vs. Am. L. Trust & Ins. Co., 33 N. J., 487.
Ins. Co. vs. Mowry, 96 U. S., (6 Otto), 544.

The testimony as to the custom of these two men in collecting any premiums except those due on policy in suit, should have been ruled out, because it is entirely insufficient to establish any custom, and does not appear to have been known to the assured; or that he was in anywise influenced by it, consequently it was absurd to permit it to go to the jury, as proving what every custom must prove—that it has continued from time immemorial, has been peaceably acquiesced in, is reasonable, certain, consistent with law, and was known to all—or that the insured knew it, and relying upon it, was misled.

Taylor vs. Ætna L. Ins. Co., 13 Gray, 434.
Adams vs. Otterback, 15 How., 539.
Schwarz vs. Germania L. Ins. Co., 18 Minn., 448.
Hartford Prot. Ins. Co. vs. Harmer, 2 Ohio St., 452.
Luce vs. Dorchester Fire Ins. Co., 105 Mass., 298.
Continental Ins. Co. vs. Willets, 24 Mich., 268.
Franklin Ins. Co. vs. Sefton, 53 Ind., 380.

III.

The testimony of L. D. Hawley was erroneously admitted, as the court will see by examination of the following copy of draft testified to by Hawley:

"FARMERS' BANK OF OXFORD,
OXFORD, IND., Oct. 4, 1875.

165 $\frac{41}{100}$] [No. 1606.

Pay to the order of Jackson Riddle, Esq., one hundred sixty-five $\frac{41}{100}$ dollars in current funds.

To WINSLOW, LANIER & Co.,
New York City.

(Endorsed on face) W. L. & Co., Oct. 14, 1875. Paid.
L. D. HAWLEY,
Cashier.

(Endorsed on back) Pay to the order of William G. Herron, Esq.
JACKSON RIDDLE.

(Endorsed) W. G. Herron, pay National City Bank, N. Y., account of First National Bank of Chicago.
L. J. GAGE,
Cashier.

(Endorsed) National City Bank, New York—Paid."

Because the same does not appear from itself, or any other evidence, to have ever been in the possession or passed through the hands of defendant or any of its agents.

IV.

The testimony of Orne Templeton concerning a conversation with one of plaintiffs, at which neither defendant nor any of its agents was present, was clearly incompetent and erroneously admitted when offered on behalf of plaintiffs.

The testimony of Caroline R. Doster set forth in *seventh* error assigned was inadmissable for the same reason.

The testimony of Taylor Riddle in *ninth* error assigned was clear by inadmissable under the same objection.

This testimony was manufactured for the occasion, but even if competent it was immaterial. The intention of the insured is not an element in waiver.

V.

The testimony of Frank Doster in *eighth* error assigned was, with doubt, wrongfully admitted, because it is secondary evidence and no foundation had been laid for its introduction. It had been agreed by witness himself, as attorney, that exhibit "B" attached to witness Fowler's *second* deposition was a full compliance with the demand made for the original books.

The testimony of Taylor Riddle in *tenth* error assigned was beyond question secondary, and inadmissable for the reason that the original which should have been in his possession was not sufficiently accounted for. In fact, no mention was made about its whereabouts.

VI.

The only evidence in this case was that of plaintiffs; consequently there could legally be no conflict, and, taken to-

gether, it did not tend to prove sufficiently, to make a *prima facie* case, the claim set up in the pleadings; and therefore the court erred in overruling defendant's demurrer to the evidence.

The evidence in every case to entitle the jury to the privilege of considering it, must show *prima facie* every thing essential to recovery.

In this case it was necessary to show a valid waiver of prompt payment of the premium due September 20th, 1876, by the company, or some agent of it authorized to waive forfeitures, or a general course of dealings of its agents, known to and sanctioned by the company, from which an intention to waive could properly be inferred.

Ins. Co. vs. Wolff, 95 U. S. (5 Otto), 326.

Ins. Co. vs. Sefton, 53 Ind., 380.

The testimony did not prove a waiver of that payment.

VII.

Defendant's *second* instruction asked the court to tell the jury merely that if Jackson Riddle had notice that William Herron had no authority to waive prompt payment, it was sufficient to put him on his guard, and if he was foolish enough to rely on Herron's promises, plaintiffs suffer from his fault solely. This was a proper instruction warranted by the proof, and the refusal of it was error.

The testimony of plaintiffs shows that such notice was printed in *red ink* on the policy and renewal receipts, which were delivered to him and he is presumed to have read the same and is as much bounden by these notices as by the contents of the policy itself. (See pp. 37 and 38, pp. 66 (con. 3d), 81, 98, 120, 121 and 122.)

Roberts vs. Chenango Mut. Ins. Co., 3 Hill, 501.
Murdock vs. Chenango Mut. Ins. Co., 2 Comst., 210.
Duncan vs. Sun Ins. Co., 6 Wend., 488.
Donald vs. Piedmont, etc., Ins. Co., 4 S. C., 327 bottom page.
Franklin Ins. Co. vs. Sefton, 53 Ind., 380 and 389.
Bouton vs. Amer. Mut. Life Ins. Co., 25 Conn., 542.

VIII.

The *third* instruction in substance declared that there was no evidence tending to show that William G. Herron was ever known to the company to be even a sub-agent. That in fact he was shown by plaintiffs to be only a sub-agent with exceedingly limited powers, under a contract between himself and H. H. Koon, the company's agent at Chicago.

That the evidence does not show that the company ever had any correspondence with said Herron, or ever sent any renewal receipt to him, or ever knew that he was entrusted with them by the Chicago agent.

That the renewal receipts were not shown to have ever been entrusted to him by the company. That the renewal receipts were never countersigned by him, but always by the Chicago agent before delivered to said Riddle, or to said Herron, and by Herron to Riddle. The evidence most fully bears out this statement, and in justice to the defendant this instruction should have been given.

A mere sub-agent has no power, by virtue of his agency, to waive forfeitures.

Continental Ins. Co. vs. Willets, 24 Mich., 268 & 270.
Bouton vs. Amer. Mu. L. Ins. Co., 25 Conn., 542.

IX.

The fifth instruction, to-wit, "that the jury will totally disregard all evidence in this case tending to show any custom with this defendant, other than the custom which is brought home to the knowledge of Jackson Riddle; all customs, general or special, with other parties, unless that custom was brought home to the knowledge of Jackson Riddle," was asked by defendant on the trial and refused by the court, was justified by the evidence and is a sound rule of law. What effect could a custom have upon the mind of man to mislead him or govern his actions when he was in total ignorance of its existence?

Taylor vs. Ætna L. Ins. Co. 13 Gray, 434.
Adams vs. Otterback, 15 How., 539.
Sullivan vs. Cotton States L. Ins. Co., 43 Geo., 423.
Luce vs. Dorchester Mut. F. Ins. Co., 105 Mass., 298.
Continental Ins. Co. vs. Willets, 24 Mich., 268.
Wood vs. Poughkeepsie Mu. L. Ins. Co., 32 N. Y., 534.

X.

The defendant was refused the following (its 6th) instruction: "That the jury will totally disregard all evidence in this case which tends to show any act on the part of anybody tending to show a waiver of any premium upon the policy of Jackson Riddle other than that which fell due on the 20th day of September, 1876." Each annual premium was a condition precedent. The evidence in this case justified and required the giving of this instruction, for Herron testifies that in April, 1875, he told Jackson Riddle before his removal from Monticello, Ill., that he (Herron) was no longer agent of the

company, and he (Riddle) must look promptly to the payment to the company of his premiums. (See p. 23, Record, last question.) And in October, 1875, in the letter which enclosed his renewal receipt, he was informed in the future to remit direct to the Chicago office. (See p. 66, Record, about middle p.) Therefore he could not possibly have been misled subsequent to that time, by any course of prior dealings which might have obtained between him and Herron. His future action, he was told, must be different, that he must pay promptly; and this information, this notice of a change in the course of dealing on the part of the company toward him, was given by the same person, who plaintiffs claim, had been the company's actor prior thereto, so far as his policy was concerned; and if the one bound the company the other must release it; especially so when the letter from the authorized agent of the company confirmed the latter.

Hudson vs. Knickerbocker L. Ins. Co., 28 N. J. Eq., 167 and 169.

Ruse vs. Mu. Ben. L. Ins. Co., 23 N. Y., 516.

XI.

The eighth instruction asked by the defendant was proper, and the refusal of it was error.

"Eighth. The court will instruct the jury that if the defendant, by its agent at Chicago, mailed, postage prepaid at Chicago, a notice, or notices of the time when the premiums for the year 1876 became due, and directed to Jackson Riddle, at the post office which they had good reason to believe was his post office, and Jackson Riddle did not receive these notices, that that is no excuse for his not paying the premium on the 20th day of September, when it became due."

The plaintiffs in their pleadings only allege that defendant was compelled to give notice, &c., *by mail,* and the proof was abundant and undisputed that three notices were mailed, postage prepaid, to Jackson Riddle, one at Monticello, Ill., his former residence, and two at Fowler, Indiana, the place where the agent had been creditably informed and truly believed, the said Jackson Riddle resided. (See printed Record, pp. 57 and 58 and Exhibit B, of Bickford's second deposition, p. 60.) That fact having been proven by plaintiffs beyond cavil or question, the case stands the same as it would had the same fact been admitted in the pleadings, and the refusal of the instruction was an injustice to defendant.

Epstein vs. Mu. Aid & Ben. L. Ins. Co., 28 La., Ann., 938.

XII.

The tenth and twelfth instructions were both highly proper and should have been given. They asked the court to tell the jury that Jackson Riddle took the risk of death's intervening between the day when the policy, by its terms, declared the premium due and the day of the tender of payment, and that his intention to pay, not communicated to the defendant, could not be shown in this case.

Time was the very essence of the contract, and if forfeiture occurred, it can be insisted on by company without any notice to the assured of its intention to do so.

Pendleton vs. Knickerbocker Life Ins. Co., 5 Fed. Rep., 238.

XIII.

The court erred in giving the instruction asked on behalf of the plaintiff set forth in the thirteenth error assigned; in this that it submits to the jury the conduct of the defendant in its dealings with assured, and others similarly situated, when the evidence does not support any such theory; and lastly, if defendants subsequently approved of such conduct, etc., with full knowledge of the facts, when there is not one word of testimony that the defendant ever was advised of one of the acts of Herron, shown in the proof. And when there is not one *iota* of evidence that Jackson Riddle ever knew of the conduct of defendant toward any other policy holder. Besides evidence of a custom to receive the payments of premiums after the day of payment had expired, from living persons who were insured, admitting that such custom was proven, still, there was no evidence that it was the custom of the company to receive the payment of premiums after the day of payment, when the life had ceased, after the assured's death, if tendered.

Sullivan vs. The Cotton States Ins. Co., 43 Geo., 423.
Columbian Ins. Co. vs. Catlett, 12 Wheat., 383, par'ly p. 389.
2 Phil. Ev., sec. 2122.

The second branch of that instruction is erroneous, particularly in this, that it gives the jury the case attempted to be made in the pleadings, but not borne out by the evidence, and most particularly because it tells the jury that under the circumstances detailed they can find for the plaintiff, notwithstanding the assured had died in the meantime.

The plaintiff in error contends that renewal of a contract

to insure a life for twelve months from a certain period, if said life be not then in existence, is not possible under the law of insurance, or any other contracts. And that no estoppel to insist upon this defense, by the defendant in this case, has been proven.

Donald vs. Piedmont Life Ins. Co., 4 S. C. 321.
Simpson vs. Ac. Ins. Co., 88 E. C. L., 257.
Tarleton vs. Stanforth, 5 Term, 695.
Want vs. Blunt, 12 East, 183.
Mut. Ben. Life Ins. Co. vs. Ruse, 8 Geo., 534.
Sullivan vs. Cotton States Ins. Co., 43 Geo., 423.
Giddings vs. Ins. Co., 102 U. S. (12 Otto), 108.
Ins. Co. vs. Young, Admr., 23 Wall., 85.
Piedmont, etc., Life Ins. Co. vs. Ewing, 92 U. S. (2 Otto), 377.

The last branch of this instruction is relative to the defendant's custom of sending notices to assured of the amount due, time when, and person to whom payment should be made. This was not justified by the testimony, because if the evidence shows anything it undisputedly shows that three notices were sent, each stating what it is claimed they should state (see Record, pp. 57, 58 and 60). It also shows that although they were not in fact directed to the assured at his actual home, yet two at least, if not all, were received by him, and his son, to whom was entrusted the payment of the premium, and by that son and his mother delivered to plaintiffs' attorney who first had charge of this case (see page 92 of Record, about middle of page).

This instruction should have been refused. All this was shown by plaintiffs' own evidence on the trial, and nevertheless the court under this state of case tells the jury

that if they find that such custom did exist, and that defendant neglected to do concerning payment of the last premium the same as they had concerning all others, that the policy did not lapse on the 20th day of September, 1876, according to the policy's terms, notwithstanding Riddle died before the last premium was paid. The evidence did not warrant any such an instruction being given, and it would have been erroneous under any evidence if the assured had died before actual payment of the premium after a lapse had taken place.

Epstein vs. Mu. Ben. Aid Ins. Co., 28 La. Ann., 938.

XIV.

The court erred in charging the jury, on its own motion, almost verbatim, and certainly in substance, the instructions asked by the plaintiffs and given on their behalf by the court. The portion of the charge excepted to is as follows:

"Now, the premium due on this policy September 20th, 1876, was not paid when due, and the important question for you to determine is whether or not the insurance company, or its agent authorized so to do, did waive a strict performance of the contract in this behalf, and in considering that question the general practice of the company in this respect may be taken into consideration.

If, therefore, the conduct of the company in its dealings with the assured in this case, and with others similarly situated, has been such as to induce a belief on his part that so much of the contract as provides for a forfeiture, if the premium be not paid on the day it is due, would not be enforced if payment were made within a reasonable period afterwards, the company ought not, in common justice, to be permitted

to allege such forfeiture against one who has acted upon the belief, and subsequently made or tendered the payment. And if the acts creating such belief were done by the agent, and were subsequently approved by the company, either expressly or by receiving and retaining the premiums with full knowledge of the facts, the same consequences should follow. Therefore, if you find from the evidence in this case that the defendant company were in the habit of sending renewal receipts for the premium on this policy to its local agent, Wm. G. Herron, at the place of residence of the assured, duly signed by the president and secretary of the company, leaving their use subject entirely to the judgment of the local agent, and the said agent was accustomed to receive from the assured without objection, the premiums on said policy several days after the same became due, and issue the receipts therefor, and the home company or its managing agents or officers, had full knowledge of such practice of the local agent, and received from its agent such premiums so received and retained the same, the assured had a right to believe that the company waived a strict compliance, and you may find that there was a waiver by the company of the forfeiting clause of the policy, and if the assured, relying on such practice, within a reasonable or the usual time, paid or offered to pay said premium after the day the same was due, the said policy remained in full force and effect, and the company are liable thereon, notwithstanding the assured had died in the meantime.

Now, I instruct you, that if you find, from the evidence in this case, that it had been the invariable custom of the company to transmit to the assured by mail or by its local agent a statement of the amount of the premum due, after deduct-

ing the dividend, with a notice of the time when, the place where, and the person to whom said premium could be paid, then the assured had good reason to expect and rely on such statement, and notice being sent to him, and if the insurance company by its managing agent, had notice of the postoffice address of the assured before the usual time of sending out such notice, but failed and neglected to transmit such statement and notice to the assured at his postoffice address until the 4th day of October, and the same did not reach the assured or beneficiary under the policy until October 6th, and that the assured or beneficiaries were ready and waiting to pay said premium when said notice and statement should be received, and by reason of such failure of the company to send such notice and statement, and by reason of that alone, the premium due in September, 1876, on said policy, was not promptly paid, and that in a reasonable time thereafter, to-wit, on Monday, the 9th day of October, 1876, the beneficiaries tendered to the company at Chicago, the full amount of the premium due, then said policy did not lapse or become forfeited, notwithstanding the premium was not paid on the day named in the policy, and notwithstanding the assured had died on the said 6th day of October, 1876 But if you find from the evidence, that it had not been the uniform custom of the company to send to the assured the said notice and statement at or about the time the premium became due, or if you find that the company or managing agent had not been notified of the change of the postoffice address of the assured until about the said 4th day of October, or that the company had in reality sent such notice by mail or otherwise at a prior date, properly addressed to the assured, then it was not the fault of the company that the assured was not notified,

and the want of such notice would not excuse the assured from making payment when the premium became due, September 20th, and the policy would become forfeited. If you find that the policy had not lapsed or become forfeited as before stated, then the plaintiffs are entitled to recover. If, however, you find that the policy had lapsed or become forfeited, then you will find for the defendant."

This charge was unwarranted by the evidence, as will be seen by the foregoing reference thereto, and is erroneous in law.

Klein vs. N. Y. L. Ins. Co., Supreme Ct. U. S., No. 57, October Term, 1881.
Hudson vs. Knickerbocker Life Ins. Co., 28 N. J. Eq., 167.
Franklin Ins. Co. vs. Sefton, 53 Ind., 380.
Roehner vs. Knick. L. Ins. Co., 63 N. Y., 160.
Donald vs. Piedmont &c. Ins. Co., 4 S. C., 321.
Ins. Co. vs. Wolff, 95 U. S., (5 Otto), 326.
N. Y. L. Ins. Co. vs. Stathem, 93 U. S., (3 Otto), 24.
Davis vs. Mass. L. Ins. Co., 13 Blatch., 462 and 467.
Ins. Co. vs. Davis, 95 U. S., (5 Otto), 425 and 428.
Ins. Co. vs. Mowry, 96 U. S., (6 Otto), 544.
Mut. Ben. L. Ins. Co. vs. Ruse, 8 Geo., 534.
Worthington vs. Charter Oak Ins. Co., 41 Conn., 372.
Piedmont Ins. Co. vs. Ewing, 92 U. S., (2 Otto), 377.
Want vs. Blunt, 12 East., 183.
Simpson vs. Ac. Ins. Co., 88 E. C. L., 595.

XV.

The motion for a new trial fully set forth all the errors and exceptions, and should have been sustained by the court under the authorities cited (*supra*).

ARGUMENT.

It needs no argument to show that the evidence of Herron and Hubbell was improperly submitted to the jury. It was clearly secondary and immaterial, and could not legally go to the jury, until it was shown to be competent and material, and that better evidence of the facts was not in existence, was beyond the control of the plaintiffs, had been demanded of the antagonist and withheld, or that the same was lost or destroyed, and diligent search had been made to find it, without success. The stipulation shows that a demand had been made and that defendant had *fully complied* therewith. (See Record, p. 14.)

The evidence of Hubbell, the banker, at Monticello, Ill., to whom defendant's agent at Chicago had sent renewal receipts, for delivery to persons assured upon payment of renewal premiums, is substantially, that he did, in the course of collecting a few renewals, received premiums for defendant from its policy holders, after they became due, from three days to more than two months after they become due. That they remitted premiums after paid to the general agent at Chicago. That they did not notify him when they received the money. And on cross-examination, he says, "we never accepted any overdue premium, except from the party whose life was insured, paying in person, and we considered them in good health. We never had anything to do with Jackson Riddle's insurance. We never informed him of our practices in the matter of collecting premiums." See record, pp. 30 and 31.

Nothing in the above testimony seems, or tends, to show that Mr. Riddle ever knew of his treatment of defendant's

policy holders and his conduct could not have influenced Mr. Riddle's action.

The testimony of William G. Herron, who was a sub-agent of H. H. Koon, company's Chicago agent, on p. 23 of record, "I had no employment except by my written contract."

Page 25, Record, extract from written contract:

"Ninth. You are authorized to receive renewal premiums not past due, but not to make receipts for the same All renewal receipts to be valid and binding must issue from the home office, and to be signed by an authorized officer and countersigned by the general agent at Chicago, Illinois."

Page 26, Record, statement signed by Herron:

"It is a fact of universal acceptance and acknowledged among the insured and the agents of the Phœnix Mutual Life Insurance Company, of Hartford, Connecticut, that a policy in said company ceases to be in force and is void if the premium is not paid on the day it falls due, and that the acceptance of a premium subsequently is merely an act of grace, at the option of the company, and renews the policy only from the actual date of payment. These facts are advertised in the papers and documents of the company, and no agreement which is inconsistent with them was ever made by me with any policy holder or any statement which would lead them or him to suppose that these conditions waived in their or his case. I may have said to parties, knowing them to be good for their contracts, that I would carry them for a few days to the end of the month; in such cases marked them paid on the books when due."

And further he testifies:

"I acted as agent of the company in the collection of renewal premiums due from policy holders, at Monticello,

Illinois. I solicited the application for Jackson Riddle's policy, and sent it to the company, and a policy was issued on that application. I collected the renewal premiums on Jackson Riddle's policy while I remained at Monticello, Ills. I collected the premiums for the years 1872, 1873 and 1874. I was furnished with renewal receipts for those years by the general agent at Chicago, Illinois. I collected the renewal premium on Jackson Riddle's policy for the year 1872, about September 20th, 1872. For the year 1873—I cannot be distinct, but I think about September 28th, 1873. It was before the first day of October. I usually reported about the first of the month of October, and he had paid before that time. The renewal premium for 1874, I cannot say positively when I collected it; I think not till October some time; I think so because I made notes of Mr. Riddle's renewals in October. I marked it reported in November. My reason was that Mr. Riddle asked me for some indulgence. I think I went to the bank with him; whether I signed a note with him at that time or at another I cannot say, but he got the money, came to my store, and paid it in person. My custom was to report payment of premiums the first of the month following, but I did not always do it."

On p. 27, Record, will be found the following:

"I had a conversation with Mr. Riddle while I was agent of the company, in which I said to him, that I would not be so particular with him as to a day; that I did not report usually till the first of the month, where I considered parties perfectly responsible. I was not so particular. I think I told him once that this company was not so strenuous as some companies I had known of; that I had sent in overdue renewal premiums and they accepted them when the parties

were all right. This conversation occurred while I was agent of the company."

P. 28, Record:

I think he might have so understood it from myself as agent. I think he understood from myself that he could pay me overdue premiums and the company would receive them.

Cross-examination:

I never had from the defendant company any other authority to represent it than that shown in Exhibit A. I never received any overdue premiums for the company except from the parties whose lives were insured in person. I required such payments to be made in person that I might judge of their condition of health at that time.

"The company was not informed of any indulgence given by me to policy holders. I had a conversation with Jackson Riddle in 1875, either in Monticello or at his residence, near here. I said to Mr. Riddle that I had ceased to be agent, and that he was about to move to another state, the probability was there would be no agent of the company in the town he was going to move to. I said to him to be a little more particular about looking after his renewal receipts himself. I added to that not to depend on me any more."

If the conduct of Herron was in itself sufficient to show a waiver, had his conduct been known to defendant, it falls in the face of the fact that his testimony shows that it was a friendly arrangement between him and Riddle, and was totally unknown to the company. It is true, he seems to say that Mr. H. H. Koon, the company's Chicago agent, had knowledge of the fact that he received past due premiums from other parties, and did not object; but he does not say, nor does any testimony show, that H. H. Koon, the com-

pany's Chicago agent, had any knowledge of Riddle's having paid his premium after it was due in any year, nor any knowledge of the course of dealing between Herron and Riddle; on the contrary, Herron testifies that he did not notify the company concerning it. Now, then, if the company and its agents were ignorant of Herron's dealings with Riddle, and such dealings were beyond the limit of his powers as sub-agent, then it cannot be bound by them, and such dealings do not tend to show that the company, *with full knowledge of all the facts*, waived prompt payment of the premium due September 20th, 1876. If the company and its agents did know of a custom of Herron to accept past due premiums from its policy holders, other than Jackson Riddle, and accepted such premiums so paid, and retained the same with full knowledge of all the facts, and thereby waived prompt payment of all subsequently maturing premiums on their policies, there is not one iota of testimony in this case that Jackson Riddle ever knew the above fact that such a custom existed, or any thing concerning it, and that could in nowise have influenced his action or misled him. What was done with him by Herron was clearly a matter of friendship. They had been friends from boyhood. It was kept a secret from the company and its agents, and was clearly in excess of Herron's powers, and Riddle knew it so to be. Riddle was fully and completely notified that Herron had no power to do as he was doing.

While parties dealing with an agent, even a sub-agent cannot be bound by any secret instructions or restriction of his powers: every one dealing with an agent is governed and bound by the powers of the agent, so far as those powers are notified to him by the principal. It must be presumed

that Riddle, the insured, was a rational being, competent to contract.

This being conceded, he and the beneficiaries under this policy will be held responsible for his acts and conduct. What right had the insured to assume or believe that Herron was authorized by the company to violate, alter, change, modify, or vary the conditions of the contract?

Herron was either a sub-agent, a special agent or a general agent. If he was a sub-agent, no such right could he assume.

If he was a special agent, empowered to effect this particular insurance and no other, it was the legal duty of the insured to look to his special authority and the company is not bound beyond the special authority.

If he was a general agent, the *limitation* is that he must keep within the usual, ordinary and lawful scope of the business committed to him; unless those with whom he deals are by the company notified of his powers and limitation, and so far as such notice is given, all persons cognizant of it are bound by it.

In the utter absence of any evidence that the company ever knew of or ratified any act done by Herron in excess of his authority, beyond the limit of his powers, in his dealings with Riddle it cannot be presumed that it has ratified the wrongful act, or sanctioned the extraordinary dealings of Herron.

Was the conduct of Herron within the usual, ordinary and lawful course of dealing in like business? Such a practice was extraordinary. It is without the usual course of that business.

Had Riddle not been notified, and had Herron's agency

been of a general character, the natural and proper inference for the insured to draw from the fact of Herron's consenting to receive the premiums after due, would be that he, in so doing, would be exceeding the authority of the principal.

The policy called for prompt and punctual payment to the day, and when Herron agreed to do otherwise, Riddle should have asked for his authority, should have demanded to have seen a subsequent ratification of this unusual and unauthorized act, or should have demanded proof that the act done had at least been fairly reported to the company. Riddle did not take any of these precautions, and besides neglected to ascertain whether the company had ever been adviser of, or raified an act, which he was by it positively notified Herron could not legally do. He should not have relied upon it. These accommodations were for his benefit. These leniencies were an advantage to him and he accepted them, taking the risk of a ratification. It was not done, and his family must suffer for his folly.

The testimony of Orne Templeton, Taylor Riddle, Frank Doster and Caroline R. Doster, should have been excluded under a rule that needs no citation of authorities to support it. There are many propositions and rules in law so well settled that references are not necessary.

The tendency of the testimony of Taylor Riddle and Caroline R. Doster is to show that the assured had no money wherewith to continue payments on his policy for the future, or for the year 1876, at least. That he had arranged with Taylor Riddle, his son, and a beneficiary in this policy, to pay it for him whenever a notice of the amount due, time when, place where, and to whom the same was to be paid, should be received according to custom.

These conversations and arrangements which resulted from them were all made without the presence of company or its agents. Accorrding to this improper and illegal testimony, Mrs. Doster was to watch for the notice and take it when received, post haste, to Taylor Riddle, who was to buy a draft and send it to Chicago. Taylor was waiting anxiously for the notice to arrive. He had the money waiting to buy the draft and send it to Chicago. The notice did not come until October 6th, 1876, after Mrs. Doster had returned home; but on that day the notice was in the possession of Taylor Riddle, Fowler, Ind., who was to pay the premium, and he intended to do it at once; had the money to do so at once, but news of his father's death called him to Oxford, Ind., and kept him away until the 9th of October. Taylor Riddle was at Chase & Chase's office in Lafayette, Ind., on the 9th of October, 1876, taking legal advice about this claim before returning to his home, from which he had been summoned on the 6th. It was then deemed necessary to telegraph to Chicago to have a tender made, which was done, and the reason for making this tender at that late day, while all the circumstances were still green in his memory, was because insured had paid the 1875 premium on October 9th, 1875, to the Chicago agent. (See p. 69, Record.)

The reason was not assigned that he did not know the amount and was waiting for notice with the money arranged for with Taylor Riddle, who was there present, but it was said on that occasion by Mr. Taylor Riddle that insured had provided the money to pay his insurance premium but had loaned it to Doster, his son-in-law, in Kansas, who had promised payment, and from whom he was daily expecting to receive it. If the story of the notice and arrangement be

true, why did he not then say so, and say the money was waiting at Fowler, where he had it, as he swears, on the sixth before, ready to pay. But instead of mentioning that fact, he borrows his attorney's credit to telegraph on, and allows his mother's cousin to stand good for its payment (see page 92 of Record).

It did not occur to Mr. Taylor Riddle then, that prompt payment was not made because of failure to receive the notices usually sent, because those notices, directed where they may have been, were all received in due course of mail. Two of them were there before him, his mother and their attorneys, and the other had been left by him at home (see p. 92 of Record). This witness gave two depositions in this case, and then was sworn as a witness. In his first deposition he swore he did not receive the notice dated October 4, 1876, until the 9th. In the second he swore positively that he received it on the 6th of October, and on the stand he swears he has no distinct recollection when he received it, but he believes it was on the 6th of October (see page 107 of Record).

He says the news of his father's death so affected him, that he cannot remember. His memory about that time is somewhat obscure, and he only comes to the proper conclusion concerning the facts from circumstances and matters to which his attention has been called by conversing with his friends since his first deposition, which force him to the conclusion that he was mistaken on his first. Yet his mind so obscured, his reason and memory so dethroned by grief as to be a *blank* concerning this fact, is most clear and accurate upon the point that Mr. Chase, plaintiffs' own witness, has perjured himself in this case (see pp. 109 and 110).

The court need only read the letter written by Taylor Riddle to Mr. Chase (p. 117 of Record), to confirm the fact that two of these notices were submitted to Chase on October 9th, and that it was stated to him then by Taylor Riddle that a third had been left at Fowler, Indiana.

This letter was dated October 10, 1876, in which he says: "I arrived at Fowler last night and found the *other* notice from the insurance company."

It is perfectly apparent from all the circumstances that this word *other* was used in reference to the first and third notices for 1876, as testified to by Mr. Chase. If the matter of necessity for notice had been under discussion, and it had been understood that want of notice relieved Mr. Riddle from prompt papment of the 1876 premium, this would have been assigned as a reason for the tender at that time. If it occurred to the attorney's mind to inquire for this notice, as Taylor Riddle says in his explanation (p. 117 of Record), this branch of the case must have been uppermost in his mind, and failure to find the notice and information that none had been received would have decided him to insist upon this reason why the policy was not lapsed.

Taylor Riddle's testimony was worthless and the court should have so told the jury. The court proceeded upon the theory that there was a conflict of testimony, because those facts which proved that the plaintiffs had no cause of action were drawn out upon cross-examination of plaintiffs' witnesses, and because some of the plaintiffs themselves were examined as witnesses on the trial and gave depositions to prove that their own disinterested witnesses had testified falsely. It was deemed necessary to bolster up their case in this manner, but it did not produce a legal conflict of testi-

mony. Cross-examination can never make a conflict unless it is improper, and this objection must be made and noted when the depositions are being taken, and can not be first made on the trial, either in the Federal Court or the State courts of Kansas. No such objections were made in this case, either at the time of taking the depositions or on the trial and there was no conflict.

In considering a demurrer, the court must treat all the testimony, whether on direct or cross-examination, as the evidence of the plaintiff, and if, taken together, it would not support a verdict, the demurrer should be sustained.

Plaintiffs prove by witness Herron, p. 29, Record, that Jackson Riddle could read, and they also prove by same witness and by witnesses A. G. Towler, Aaron C. Goodman, J. M. Holcombe, that the policy and renewal receipts contained a notice printed conspicuously thereon in *red ink* to the effect that agents had no authority to accept premiums after past due, etc. The policy and all the renewal receipts introduced show such notices thereon. (See pp. 97, 119, 120, 121 and 122.) This fact is uncontradicted.

He knew, therefore, that Herron was exceeding his authority. He knew, too, that his money so paid was retained and supposed his policy still existed unimpaired, which was the fact.

Suppose the retention of his premiums paid after due, although this fact was not known to the company, was in fact a ratification of an unauthorized act; and we do not contend that an unauthorized act of an agent, or even a third party, may not be made binding by ratification; and by this action of retention, the company had led him to believe that he could continue in the future to pay his premiums when-

ever convenient. I say, suppose this has been shown, it cannot avail the plaintiffs, because, in the spring of 1875, one year and a half before September 20th, 1876, he was told and notified that he would have to be prompt in the future and was also, one year before, notified where to pay his premiums, and this was sufficient to disabuse his mind of the belief which was prior thereto misleading him. Subsequently to April, 1875, he is not shown by the evidence to have been misled. The evidence does not show that he was ever misled. He was a chronic delinquent, purely from his want of money. He was, at one time at least, getting his friend Herron to indorse for him at the bank. He struggled along in this way under a burden too heavy, and finally *intentionally*, in his straightened circumstances, *gave up*. Herron says he did it to save a good risk to the company and the commission to himself, and that the company knew nothing about it.

However, subsequent to April, 1875, when he was notified that the former course of dealing would cease, he was bound to abide by the condition of his policy strictly. All the authorities supporting the theory that the companies who have, by their course of dealing, lulled the insured into the belief that he can continue as he has been allowed to do, hold that it would be injustice to allow the companies, on payment of the next annual premium, to insist on a forfeiture without notice of such intention. This is as far as any of them carry the doctrine of waiver. No one has ever decided that although the company may waive any condition of its policies put therein for its benefit, for a number of years, that it cannot, upon sufficient notice, again insist upon a strict compliance, and no one will ever make so absolutely

an absurd decision. Otherwise the insured could take out a policy and go on under such course of dealing for two or three years, and then neglect to pay longer, till the day of his death, fifty years hence, and at that time his beneficiaries might collect the amount of his insurance, allowing the company the privilege of deducting from the amount of insurance the aggregate sum of the unpaid premiums that had accumulated in the last fifty years of insured's life.

The courts have never intended to carry this doctrine of waiver to that extent, although it will be argued that they have, and that when a company has adopted one course of dealings with one of its policy holders which would seem to notify him that the company did not intend to insist upon forfeiture of the policy for non-payment of renewal premiums promptly, that this course of dealing can never thereafter be changed upon notice. Many of these decisions carry the doctrine of waiver already altogether too far, but none have gone to that height of absurdity. Most of them say that the course of dealing once adopted cannot be changed to the prejudice of the insured *without notice* of the company's intention to change. This is a correct rule, and a reasonable one for both parties. Under no other kind of contracts would one party who has been lenient, and granted favors to the other party be required to continue his favors *ad infinitum*, when he chose to withdraw them *in futuro*, and so notified the other, and notified him that he must govern his future action so as to comply strictly with the terms of the contract, and to look for no more favors. Why should life insurance contracts be construed differently from any other. They should not, and will not be, by this court.

The case of Meyer vs. Knickerbocker Life Insurance Co.,

51 Howard's Pr. R., 263, was an action brought during the lifetime of the insured to enjoin the company from cancellation of her policy and compel it to receive payment of premium for the reason that by an arrangement acted upon by both parties, she paid a portion of each annual premium in cash, and a credit was given her for a part of each premium, upon which part she paid interest annually in advance. It was a "policy with profits," and the amount of the profits to which each policy holder was entitled, was determined by an annual statement made by the officer of the company. From this arrangement, it became necessary to enable her to know what sum to pay, that a statement should be furnished her by the officers of the company, showing the principal cash sum to be paid, etc. The officers of the company, in seeming recognition of this necessity, did actually furnish her with such statement annually, to March 20th, 1874, for her guidance in making her annual payments. In pursuance of this custom and arrangement, she, on March 13th, 1874, wrote a letter to the company which was received March 16th, 1874, in which she says: "Sir, will you have the kindness and let me know how much you want for the whole year, I am willing to send it down to you as soon as I have it." The local agent, through whom the insurance had been effected, and to whom all prior payments had been made, had been withdrawn, but the plaintiff had received *no notice* or intimation from the company up to the time of writing this letter, that the *manner of transacting the business* was to be changed, or that she would not receive the annual statement showing the amount to be paid for the year 1874, in ample time to enable her to make payment on or before March 20th, in that year, such as had been furnished her in each previous year. I think

(says the learned judge), upon all the facts and circumstances, that it was the clear duty of the officers of the company to furnish her the usual annual statement. Such information was necessary to enable her to make the payment. It had uniformly been furnished her in years before *without any request on her part*, and from this uniform course of dealing she was led to believe and might fairly rely upon such information being furnished, before any advantage would be taken of her non-payment. This course of dealing had been going on for several years. The defendant can not be allowed to entrap a policy holder by its action and course of dealing through a series of years, upon which the policy holder relies and both parties act; then suddenly terminate their course of dealing *without any notice* to the policy holder of any intended change on the part of the company. Besides, the the letter of March 13th, 1874, fairly notified the officers of the company that the plaintiff required the necessary information to enable her to know what sum to pay under the policy and *course of dealing, which the defendant had sanctioned.*

It was a duty that the defendant owed to her, and which its officers must discharge of necessity before she could pay, or *at least to have notified* her that the previous manner of payment would not be continued, and that she would be required to pay in accordance with the *conditions of the policy.*" This case fully and clearly lays down this principle of estoppel upon which so many other cases have been decided, and carries the doctrine to its fullest extent. No case can be found which decides that the company cannot change any course of dealing outside of the letter of the policy whenever it deems it proper, upon due and timely notice to the policy holder.

A uniform course of dealing with the insured, whereby he is led to believe that the company will continue the same, merely establishes a *custom* between company and insured to do certain things under certain circumstances. No one will contend that a custom good as between the parties, which takes the place of law, under one set of circumstances can be said to be a custom with that effect when the circumstances have entirely changed. A custom to allow a live and healthy man to pay past due renewal premiums on a policy of insurance upon his life, cannot be tortured into a custom to allow his beneficiaries or legal representatives to continue in force a policy of insurance upon the life of a dead man. Because the circumstances have changed. There no longer exists the life to be insured. There is no subject matter of the contract. The tender of premium makes no difference. The contract was a live, subsisting contract at the day of his death, or it was an expired dead contract at that time. If it had expired no recovery can be had. If it was in existence at the time of his death no tender was necessary, except to continue it on after his death. This was not necessary. Each of these cases stand upon its own merits, and in deciding this case the court must do it upon the proof.

It has been decided in Illinois, Iowa, Pennsylvania and Alabama that where a policy of insurance is issued on the half note plan and the cash payment differs in amount from year to year, the company, by the nature of this contract, should send insured notice of the amount, and until it does send this notice it can not claim a forfeiture of its policy; although it might be claimed under the express letter of the contract. The proof shows that the policy in suit was what was known as the general life, half note policy, and the com-

pany, during its continuance, was accustomed to send notices to Mr. Riddle, of the time when due, amount, and to whom payment could be made, up to and until the 1876 payment. These notices were always sent from the Chicago agency, and to the notices for the years 1872, 1873 and 1874 was pasted a little slip of paper, which said, "you can pay this premium on or before the day it becomes due, to Wm. G. Herron, agent, at Monticello, Pratt County, Ill., or remit direct to this office." The notice for 1875 was sent from same office, addressed to Jackson Riddle, Monticello, Ill., was by the postmaster forwarded to him at Oxford, Ind. (p. 123, Record), was received by him, and introduced in evidence in this case, but to this no poster was attached, and the premium was paid to the agent at Chicago. The testimony of plaintiffs show, and that too, without any contradiction, that the first notice for the year 1876 (p. 54, Record) was sent to Jackson Riddle about thirty days before September 20th, 1876, and addressed to Monticello, Ill. At the same time his renewal receipt was sent to Piatt, Hubbell & Co., bankers, at Monticello, Ill. That on September 6th, 1876, a letter (p. 60, Record) was received from Piatt, Hubbell & Co., returning the renewal receipt and informing company that Mr. Jackson Riddle lived in Fowler, Ind. On September 7th, 1876, a similar notice was sent to him, addressed to Fowler, Ind. The last notice was sent to him at Fowler, Ind., on October 4th, 1876, and was received. The same testimony shows that each of these notices was enclosed in an envelope with a card to return if not delivered in ten days, upon it, and that neither was returned.

This court held in Ins. Co. vs. Eggleston, *supra*, when, after the policy was issued, the company discontinued its

agency at Columbus, and from time to time, as the premiums became due, notified insured by mail where and to whom to pay them. No notice as to the premium due November 11, 1871, having been received by him, it was ascertained, by inquiry of the agents at Savannah, Ga., and Vicksburg, Miss., to whom payment had formerly been made, that the sub-agent at Macon, Miss., held the receipt. Payment was tendered him December 30, but he refused to accept it unless a certificate a A's health was furnished. A died January 5, 1872. The company, when sued, set up the forfeiture of the policy by reason of the non-payment of the premium on the day it was due.

Held: That A., in view of the company's dealings with him, had reasonable cause to expect, and rely on receiving, notice where and to whom to pay the premium, and that the company was estopped from setting up that the policy was forfeited by the non-payment, on November 11, of the premium then due.

This decision was rendered upon the facts of that case, and is a fair exposition of the law. In that case the agency had been changed, but insured's residence remained the same.

In that case there was inquiry made, diligence displayed, which was brought home to the knowledge of company's agents. The tender was made during the life-time of insured. In this case, the agency at Monticello, Ill., had been discontinued, but the notifying agency remained the same. The insured had changed his residence and took no pains to notify any one of the fact, except, perhaps, Mr. Herron, who he knew, before his removal, was no longer agent of the company. This notice was never brought home to the knowledge of any agent of the company.

However, in the agent's effort to get this notice, as usual, to Mr. Riddle, he ascertained from a reliable source that Riddle's residence was Fowler, Ind, He believed this to be the fact, and renewed his notice there, and even a second time. This was all that was necessary, as will be seen in Epstein vs. Mu. Aid Association, &c., 28 La. Ann., 938. "If a policy of life insurance contains a stipulation that the assured shall pay a certain assessment within thirty days from the time that notice is given to him that said assessment is due, and that on his failure to pay said assessment, as stipulated, the policy shall be void, the stipulation will be upheld and enforced. If the assured reside out of the city of New Orleans, and the notice of the accrued assessment in writing is directed to him by the secretary of assurers to such address as the assured has left at the office of the secretary, and mailed in the city of New Orleans, such notice will be held sufficient, and no evidence will be admitted to show that the assured did not receive the notice."

In the case last mentioned the contract itself made the notice necessary and the court properly held that notice addressed to him, at his place of abode, was sufficient whether he received it or not. This company could not be responsible for the mail service.

The proof, however, of plaintiffs themselves, shows that all of the notices were received, but none elicited a response until after a railroad accident had dispatched Mr. Riddle within a period thereafter, sufficiently soon to give plaintiffs' claim a show of standing.

This court has already decided in the case of Ins. Co. vs. Wolff, *supra*, that time is material, and of the essence of the

life insurance contract, and a failure to pay involves an absolute forfeiture. Mr. Justice Bradley says:

"The annual premiums are an annuity, the present value of which is calculated to correspond with the present value of the amount assured, a reasonable percentage being added to the premiums to cover expenses and contingencies. The whole premiums are balanced against the whole insurance. But whilst this is true, it must be conceded that promptness of payment is essential in the business of life insurance. All the calculations of the insurance company are based on the hypothesis of prompt payments.

Forfeiture for non-payment is a necessary means of protecting themselves from embarrassment. Unless it were enforceable, the business would be thrown into utter confusion.

Delinquency cannot be tolerated nor redeemed, except at the option of the company.

When no stipulation exists, it is the general understanding that time is material, and that the forfeiture is absolute if the premium be not paid.

The case, therefore, is one in which time is material and of the essence of the contract. Non-payment at the day involves absolute forfeiture, if such be the terms of the contract, as is the case here. Courts cannot with safety vary the stipulation of the party by introducing equities for the relief of the insured against their own negligence."

The contract in the case at bar is a unilateral contract. The compulsory part of the contract is upon the company, and the optional part, that of payment of premium, rests with the insured. It is optional with him whether he will pay or not. The company cannot compel payment. The rule of

law is upon all *contracts* executed for a certain time, to be continued longer under the same conditions and stipulations upon further payment, at the option of one party, that the party in whose option it rests must take the steps to notify the other, and within the time, complete his performance to make it continue. This is the rule in case of a lease executed for a certain period with permission of a certain other term under the stipulations of the same lease, at the same rent paid in advance or otherwise.

Thurber vs. Nat. Ins. Co. 42 Ind. 212 Reversed in Dashaway 3 Conn. 572

In this case the lessee, if he wishes to continue for the optional term, must notify the lessor. This would be the same if, by terms of lease, he were to continue optionally at the end of each year during his natural life. There can be no doubt of these principles, but any of them may be waived by the party for whose benefit they exist.

The plaintiffs must show, however, that with a *full knowledge* of all the circumstances the company intended to waive each one of these annual payments; for each is a valid *condition precedent* to the continuance of the liability of the company.

Upon the trial of this case the plaintiffs did not make any such proof, and the court erred in charging the jury in effect to find for the plaintiffs.

The decisions in Illinois, Pennsylvania, Iowa, Missouri and Alabama, all proceed upon the theory that time is not of the essence of the contract; and the case of Thompson vs. Ins. Co., 52 Mo., 469, relied upon by plaintiffs, in terms so decides.

All these cases require the custom of the company to be known to the insured, in order to be of any effect. And any particular course of dealing which misled insured must be

known to company at the time, or when known ratified by it. The failure to show either in this case is glaring.

A complete examination of the testimony will be necessary to a full understanding of this case. I have dwelt more fully in this argument upon the facts than I should have done had there been any conflict.

The charge of the court was not justified by the facts in this case, nor could the same be upheld in law under the facts of any case.

The Court inferred in the agent authority to waive forfeitures and accept past due premiums, instead of submitting that question of fact, among others, to the jury for them to find under the evidence.

The verdict in this case is an injustice upon the plaintiff in error, and the above is submitted in favor of a reversal.

H. E. BARNARD,
Attorney for Plaintiff in Error.

16-30

No. 232.

OCTOBER TERM, 1881.

IN THE

Supreme Court of the United States.

PHŒNIX MUTUAL LIFE INSURANCE COMPANY,
Plaintiff in Error,

vs.

CAROLINE R. DOSTER, *et al.*,
Defendants in Error.

BRIEF AND ARGUMENT FOR DEFENDANTS IN ERROR.

BY

FRANK DOSTER AND W. W. SCOTT & JOHN W. LYNN,
Their Attorneys.

Record Print, Marion, Kas.

IN THE

Supreme Court of the United States.

PHŒNIX MUTUAL LIFE INSURANCE COMPANY,
Plaintiff in Error,

vs.

CAROLINE R. DOSTER, *et al.*,
Defendants in Error.

We apologize to the court for the size of this brief and argument. The assignments of error are so numerous, and so many of them are based upon perverted and partial statements of the evidence—indeed some are made in direct contradiction of the evidence—that we are compelled to follow counsel in an argument which properly should have been made by him upon the law of the case, as presented in the instructions of the court. For convenience we append hereto an index, by which reference can be made to our argument upon those questions which may alone be worthy of attention.

The statement of facts made by counsel in his brief is substantially correct, so far as we have examined it, except the statement (page 5 of brief) that the defendant below, plaintiff in error here, pleaded that it was a Mutual Life Insurance Company. Such was not the case. It was neither

pleaded, proved or admitted that it was or is a mutual company, or issued the policy in suit as such, or did insurance upon the mutual plan, and as a matter of fact it is not a mutual company, but is a stock company.

I.

As a matter of first consideration by the court, and to obviate, as we think it should, the necessity of examining any of the several assignments of error, we suggest that this court does not have jurisdiction of this case, or at least ought not to entertain jurisdiction thereof, because, although the judgment of the court below was for $5,077.16, yet such sum was at least $166.00 more than the plaintiffs below were, under any state of the case, entitled to recover. It was $166.00 more, according to the undisputed facts of the case, than the matter in dispute exclusive of costs—because the plaintiffs below did not claim, and made no attempt to prove, a greater judgment than $4,911.16.

The plaintiff in error seems to have tried the case in the court below with two incidental objects in view. One was to catch the court below in as many errors as possible, the other was to keep the case always within the jurisdiction of this court. At the beginning of the trial it moved for and procured an order requiring the plaintiffs to bring into court two hundred dollars, to keep good a tender made by them to it on October 9th, 1876, for the premium due September 20th, 1876, on the

policy in suit. Transcript of record, page 18. The object of this was to prevent the court from instructing the jury to deduct said amount due September 20th, 1876, which was $166.00, including interest from said last date to date of tender.

The stipulation of the policy (transcript of record, page 2,) reads as follows:

"And the said company hereby promise and agree to pay the amount of the said insurance at their office in the city of Hartford, Connecticut, to his wife and children, or their executors, administrators or assigns, in ninety days after due notice and proof of the death of the said party whose life is hereby insured, *any indebtedness to the company on account of this policy being first deducted therefrom.*"

The plaintiff in error averred in its answer, transcript of record, page 5,

"That neither the said Jackson Riddle nor the beneficiaries in said policy, nor any one for them, nor either of them, paid or caused to be paid to defendant at the office of said defendant in the city of Hartford, Connecticut, or anywhere else, or to any agent of said defendant the annual premium of $215.00, which became due and payable under the conditions of the said policy on the 20th day of September, 1876, nor any part thereof, but that they and each of them wholly failed, neglected and refused to pay the same or any part thereof, after being duly notified so to do by the duly authorized agent of the defendant, who had in his possession and was ready to produce therefor a receipt, signed by the president and secretary of said defendant, and so failed, neglected and refused to pay said premium then as aforesaid due for a long time after the same was overdue and payable, and until after the alleged death of the said Jackson Riddle as charged in said amended petition"

And the plaintiffs below in their reply admitted as follows:

"That the policy of insurance sued upon by them con-

tained the two conditions quoted in defendant's answer and numbered therein second and third, and admit that Jackson Riddle, the holder of said policy nor any of the beneficiaries therein named, nor any one for him or them, did not pay to said defendant, nor to any one for it, the annual premium of $215.00 due upon said policy September 20th, 1876." Transcript of record, page 6.

The plaintiffs below requested the court, at the proper time, to instruct the jury:

"If they found for the plaintiffs they must deduct the amount of the premium due for the year 1876, to which defendant's counsel objected. Objection was by the court sustained and instruction refused." Transcript of record, page 129.

After the verdict was returned the plaintiffs below offered to remit therefrom $175.00, to which the defendant below objected, and the court refused to allow the plaintiffs to remit the same.

"Now, on this 14th day of December, 1878, the motion of plaintiff offering to remit "$175.00 of the verdict found by the jury on the trial of this cause in favor of the plaintiff, the same being amount of cash premium alleged to have been due September 20, 1876, and tendered to defendant, Oct. 9, 1876; and the plaintiffs appearing by their counsel, Frank Doster and Messrs. Scott & Lynn, and the defendant appearing by its counsel, H. E. Bernard. The argument of counsel being heard, and the court being fully advised in the premises, orders that the motion and offer be denied; and it is hereby ordered that the offer be denied and the motion overruled." Transcript of Record, page 129.

By the stipulation of the policy, the plaintiffs below could not, under any state of the case, legally recover more than balance of $5,000.00 and interest thereon, after deducting all indebtedness, of which the premium, due September 20, 1876, was a part, for the reason that the plaintiff in error never

agreed to pay a greater sum than balance. In addition to this, the plaintiffs below took every proper step to avoid a verdict and judgment, for more than the sum actually due, according to the contract and the undisputed evidence.

In Life Insurance Co. vs. Twining, 19 Kan., 349, it was held in a case similar to this, that the plaintiff might recover the amount of the policy, after deducting the amount due for the defaulted premium.

The language of section 3, chapter 77, page 316, volume 18, Statute at Large, speaking of judgments and decrees of the Circuit Courts is:

"Such judgments and decrees hereafter rendered, shall not be re-examined in the Supreme Court, unless the matter in dispute shall exceed the sum or value of five thousand dollars, exclusive of costs."

There is no way to ascertain the matter in dispute, in a given case, unless resort is had either to the pleadings or the evidence. In this case the evidence—the admitted facts—show that the matter in controversy was less than $5,000.00 exclusive of costs.

We do not believe that a judgment rendered for a greater sum than was due, through an error of the court or jury in the assessment of the amount, especially when rendered against the desire and over the protest of the judgment plaintiff, and in disregard of the unquestioned facts of the case, will confer jurisdiction on this court. It may be claimed by the plaintiff in error, that the tender in court of the $200.00 amounted to the payment of

the premium due September 20th, 1876, and therefore the plaintiffs below were entitled to recover $5,000.00 and interest if anything, but we are not aware of any decision holding that the tender of money amounts to the payment of the debt. Decisions can be found to the effect that the tender of money amounts to a confession of a debt, *pro tanto*. A tender of money accepted by the claimant is in law a payment of the claim. In this case the tender was made, but it was not accepted. We call on the plaintiff in error to say whether it has since accepted the tender or does now accept it. If it has accepted it, or does accept it, that ends the default, if any, in the non-payment of the premium of September 20th, 1876, and the judgment should be affirmed on the merits. If it has not and does not now accept it, we insist that the matter in controversy is, and was, less than $5,000.00, exclusive of costs, and this court therefore has no jurisdiction. The plaintiff in error can take either horn of this dilemma it chooses. Besides this, the judgment of the court below would never have exceeded the sum of $4,911.16 exclusive of costs, had it not been for the plaintiff in error. It sought every opportunity to increase the verdict of the jury and judgment of the court $166.00 more than the plaintiffs below claimed, or were entitled to have, and resisted every attempt of the plaintiffs to avoid the rendition of a judgment in their favor, of an unwarranted sum, and therefore as to this sum its conduct amounts to a confession of a judgment for

$166.00, over and above what the plaintiffs claimed, or were entitled to have, and that amount was not a matter that was in dispute between the parties, unless it was a dispute in which the defendants below insisted that the plaintiffs below should take it, and the plaintiffs below persistantly refused to accept it.

Having shown that $166.00 of the judgment herein was rendered, not only with the consent of the plaintiff in error, but by reason of its earnest efforts to procure its rendition, we assert that $166.00 of said judgment was so near a judgment by consent, that if the defendant below had moved for a new trial, for error in the assessment of the amount of the recovery, because the same was too large by $166.00, the court would not have been justified, either in granting a new trial or in requiring the plaintiff to remit the excess of $166.00, although the undisputed facts showed that the plaintiffs ought not to have recovered that sum.

The defendant below carefully abstained in its motion for a new trial from alleging such as a ground therefor, (transcript of record, page 130) lest the plaintiffs below confess so much of said motion, and thus reduce the jurisdictional sum; and plaintiff in error has failed to assign in the court any error in allowing the judgment to stand for the excess of $166.00.

We continue our offer as made in the court below, to remit from said judgment $175.00, and we are willing to stipulate in this court that said

amount shall be remitted in the court below from said judgment.

We are aware that ordinarily the amount of the judgment in the court below, exclusive of costs, determines the question of appellate jurisdiction, but we say that it is not the *sum or value* of $5,000.00, exclusive of costs, that confers such jurisdiction, but the language of the statute is, "the matter in "*dispute* shall exceed the sum or value of $5,000.00, "exclusive of costs."

The language of the statute is not that the *judgment* or *decree* shall exceed the sum or value of $5000.00. In this case there never has been, and is not now, any dispute over $166.00 of that judgment, hence there is no matter in dispute in this judgment, beyond the sum of $4,911.16.

As well might the court below have refused to allow the jury to deduct, and the defendant below have insisted that the jury should not deduct, from the face value of the policy, the amount of the outstanding premium notes, which the assured had executed to the company, which notes are copied in transcript of record, page 80, as to have refused to allow the premium due September 20, 1876, to be deducted from the amount of said policy, and by this means seek to confer jurisdiction upon this court, by swelling the amount of recovery above the minimum sum necessary to confer jurisdiction.

In Lee vs. Watson, 1 Wall, 337, it was held that a party could not amend his pleadings, so as to allege damages in excess of the minimum juris-

dictional sum, for the purpose of conferring jurisdiction upon this court.

In Kanoush vs. Martin, 15 How, 198, it was held that after the necessary steps had been taken to remove a case from the State to the Federal court, a party could not by amendment, reduce the amount claimed below $5,000.00 to prevent removal.

II.

Many objections to evidence, by plaintiff in error, are based upon its construction of the terms of a certain stipulation between opposing counsel, relative to the production in evidence of certain books and papers, under a written demand therefor which had been served upon the plaintiff in error.

"It is agreed that this demand shall be good for the present Nov. term, and the originals need not be produced, but that the copies attached to depositions now on file may be used with or without the depositions to which they are attached, and such presentation of said copies shall be in full compliance with this demand and notice on the part of defendant and plaintiff." Transcript of record, page 14.

To this construction of the stipulation we now reply, and hereafter as we discuss the several assignments of error will, for answer to those which are based upon this construction of the stipulation, refer to our views herein expressed.

The stipulation only waived the production of parts of the originals. It did not waive the production of such books and papers as the parties agreed to treat as the originals. In reality it is an agreement to treat certain copies as the origin-

als. Its effect is to make originals out of copies of certain books and papers which the agents of the company had attached to their deposition. The right to the production of books and papers which the company, for the purposes of the case under the stipulation, might be allowed to treat as the originals was not waived.

Demand was made for five large books called "registers of renewals." It was inconvenient to the company to bring these books into court, and was unnecessary to the plaintiff's case, as only those pages which contained memoranda relating to the policy in suit were important to the plaintiffs. It was an accommodation to the company not to be compelled to bring the books themselves, in order to exhibit all those facts about which the plaintiffs had the right under the demand to introduce secondary evidence. Hence the stipulation relieved the company of the necessity of bringing into court, under the demand for books, more than the several pages thereof—exhibits B, C, D, E, F, —transcript of record, page 42, *et seq.*

No argument is made that the introduction in evidence of the copies of the application for insurance and the premium notes, were in any manner affected by the stipulation, therefore secondary evidence of the contents of the *letter* demanded of the company is the only remaining violation of the stipulation of which complaint is made. The right to introduce secondary evidence of the contents of the letter demanded is in no manner affected by

the stipulation, because the stipulation is that presentation of the "copies" attached to the depositions shall be a compliance with the demand, and the letter in question is not a "copy," but is the *original.*

"I have been served with a subpœna *duces tecum* to bring with me for this examination the registers and renewals of policies for the years 1872-73-74-75-76, and a letter written by William Heron, of Monticello, Ill., to the company about the month of September or October, 1875, in which was enclosed a draft for the payment of Jackson Riddle's premium for the year 1875. * * I have the letter referred to. I will attach the letter to my deposition." Transcript of record, page 32.

This ought to be sufficient to show that the letter, is not by any theory of construction, embraced in the terms of, or affected by the stipulation.

If, however, different views from those herein expressed in relation to the "registers of renewals" and the letter can be taken, it then becomes important to understand the nature of the stipulation, and the circumstances of the parties at the time it was executed.

It was material to the plaintiff's case to show that the defendant had received notice of the change of address of the insured, prior to the maturity of the premium due September 20th, 1876.

The agent of the company had furnished, in his deposition, a letter claimed by him and it to be the only one which gave notice of such change of address—testimony of witness Fowler—transcript of record, pages 32 and 34.

The plaintiffs contended that the company had

received, prior to the date of this letter, another letter containing more explicit notice of the change of address of the assured, and for this purpose had proved the sending of such letter, and the receipt of which first letter was also proved by the recitals contained in the one which was produced.

"Ques.—State fully the contents of that letter."

"Ans.—I wrote, I think, that he lived at Oxford, Ind., and for them to communicate with him there."

"Ques.—State if you wrote that in the letter you sent the draft in, the first time."

"Ans.—I think I did; yes, sir." Witness Heron's testimony, transcript of record, page 23.

Is it to be supposed that counsel with evidence on file duly obtained, which clearly established a vital point in their favor, would deliberately stipulate that it should not be used—agree that the fact so proved was not proved, or would not be insisted on?

The stipulation is not accurately phrased, it is true, but it does not bear the construction contended for by plaintiff in error. It was intended to refer, and does refer, to the the "registers of renewals," and nothing else.

The rule of construction of statutes and all written documents, should apply here. *Ut res magis valeat, quam pereat.* The stipulating parties conceived that there was something to be accomplished by this agreement, of a mutual advantage. What was it? The plaintiff had given a notice to produce books and documents, but were in doubt whether such notice, which seems to have been for the

June term, would suffice for the November term, and desired to obviate the doubt by a stipulation; hence the first clause of the stipulation—"It is "agreed that this demand shall be good for the "present Nov. term"—and this means it shall be good for *something*. If this clause stood alone the legal effect would be that the notice, for every purpose for which the same was available at the June term, is continued to the November term. On the other hand, there were several large books called for by the notice, of which there were copies of certain portions then on file, attached to depositions. The originals of these books the defendant either was not prepared to produce or did not wish to produce, and to prevent any unfavorable impression that might be created by keeping back the originals, and to prevent inspection of that which, if produced, might be found to contain damaging evidence, desired a stipulation for its benefit that the copies on file of portions of said books should be deemed the originals of the whole of said books, for every purpose of the notice. Hence we find it stipulated on behalf of plaintiffs that "the originals need not be produced." What originals? Certainly not all the originals of each and every part of the books mentioned in the notice, for if such is the case the second clause nullifies the first, as in legal effect the first clause authorizes the plaintiffs to call for all and every part of the originals mentioned in the notice, while the second clause would, under such construction, prevent the

plaintiff from calling for any of the originals or any part of them, hence to give effect to both clauses requires us to limit the second clause in its meaning, and the question now is how far shall its meaning be limited. Referring to the purpose the parties had in mind, it is clear that the second clause is limited to the copies on file attached to depositions.

"The originals need not be produced, *but* the copies as attached to depositions now on file may be used with or without the depositions to which they are attached, and such presentation of said copies shall be in full compliance with this demand and notice on part of defendant."

The plain meaning is this: that the *originals* of which copies are attached to depositions on file, need not be produced, but the copies may be used in lieu thereof, and thus construed, force and effect can be given to every clause of the stipulation.

III.

The first point attempted to be made by plaintiff in error (page 27 of its brief), in so far as it objects to the secondary evidence offered by plaintiffs, is met by our argument upon the question of a proper construction of the stipulation between counsel, beginning ante page 9, together with the following in addition thereto:

The company's agent, Allen G. Fowler, had been subpœnaed to bring the letter of which secondary evidence was given, and testify in a deposition, transcript of record, page 32. Notice had been

served on the President and Secretary, at Hartford, to produce the letter at the trial, and on said Allen G. Fowler, in Chicago, (transcript of record, pages 80–81) which letter was not produced. Transcript of record, page 81. This was due dilligence, and sufficient foundation for secondary evidence of the contents of said letter.

The plaintiff's notices and subpœna called for

"The letter written to A. G. Fowler, superintendent of agencies of said company, at Chicago, Ill., in the month of September or October, 1875, by W. G. Heron, of Monticello, Ill., in which said letter was enclosed a draft of $165.41, in payment of Jackson Riddle's premium on his policy No. 56,960, due September 20th, 1875, and in which letter Mr. Fowler was notified by Mr. Heron that said Jackson Riddle had removed from Monticello, Ill., to Oxford, Ind. Transcript of record, pages 32–80.

No such letter was produced at the trial, nor was a copy of such letter on file or attached to any deposition, so if we are right in the construction of the stipulation, that it dispensed with the production of none but originals, of which there were copies on file attached to depositions, the notice was still in force to require the production of the letter, and we had a right on default to said question and answer, as to the contents of said letter. The letter called for was the letter that Heron testified to sending.

"I received a draft and sent it to the company. It was for the renewal premium of that year. I received it in September."

"Ques.—In sending that draft to the company did you write any letter?"

"Ans.—I did."

"Ques.—State whether you informed the company or its agent of the residence of Jackson Riddle?"

"Ans.—I informed the company to send his receipt to Oxford, Indiana, that he lived there, and to communicate with him there."

"Ques.—State fully the contents of that letter."

"Ans.—I wrote, I think, that he lived at Oxford, Ind., and for them to communicate with him there."

"Ques.—State if you wrote that in the letter you sent the draft in, the first time."

"Ans.—I think I did; yes, sir." Transcript of record, page 23.

It was the same one which Superintendent, A. G. Fowler testifies he received, as follows:

"I received from Mr. Wm. G. Heron, whose name appeared in the books of the office here as our local agent at Monticello, a letter dated October 5th; it appears this letter enclosed a draft for $165.41. The draft was unendorsed. I cannot now recall as a fact, but I am —— it required the endorsement of somebody because it was returned for that endorsement October 7th, and it was sent back in the same letter with this memorandum: 'Please send renewal receipt to Mr. Riddle at Oxford, Indiana.' And on the side of my letter was written: 'I am not agent now.'" Transcript of record, page 34.

This last mentioned original letter he attached as exhibit "A" to his deposition. Transcript of record, pages 40–41.

This is not the letter which the notice or the subpœna *duces tecum* called for, it was the one first mentioned, we desired.

In so far as the first point attempted to be made by plaintiff in error (page 27 of its brief,) involves the objection that information received by a party from one not his agent is not binding upon such

party, or is no notice to him, the bare suggestion carries its refutation with it.

It should be so well understood as to be undisputed, that to make a witness competent to testify to the giving of notice, it is not necessary that such witness be an agent of the party to whom notice is given.

An issue in this case was, did defendant below, prior to September 20th, 1876, know that Jackson Riddle had changed his post office address? The question asked the witness was, "State whether in "your letter, you informed the company or its "agent of the residence of Jackson Riddle?" Transcript of record, page 23. And it needs no argument to show that the witness may state that he notified the company of the residence of Jackson Riddle, whether the witness when he so informed it of this fact was its agent or not, otherwise no one can give notice to a corporation except an agent of such corporation, which would result in never proving a notice to a corporation at all.

IV.

The second point attempted to be made by plaintiff in error (page 28 of its brief,) is not well taken, because based upon a denial of the clearly proved facts of the case. It had been shown that H. H. Koon was the general agent at Chicago. He is constantly spoken of by all the witnesses as such, the officers of the company included. (Secretary

Holcombe's testimony, transcript of record, page 71, President Goodman's testimony, transcript of record, page 73,) and it was also shown that William G. Heron was agent of the company at Monticello, Ill., and that the company knew it. True. Secretary Holcombe swears he did not know that Heron was an agent, (transcript of record, page 72,) yet on page 71 preceding, the same witness produces the original application of Jackson Riddle, which shows (transcript of record, page 77,) that the risk was "recommended by William G. Heron, agent, "Monticello, Ill."

The books of the company, for 1872–73–74, showed W. G. Heron to be agent at Monticello, Ill. Transcript of record, page 37. Exhibits B, C, and D, which are copies of the registers of renewals at Chicago, show W. G. Heron to be agent at Monticello, Ill. Transcript of record, pages 42–45.

The contract between the company and Heron, signed by Koon for the company, showed him to be agent. Transcript of record, pages 24–26. Koon's character as general agent, and Heron's character as collecting agent, are conclusively established, and indeed undenied.

As to Mr. Hubbell, he was collecting agent for the company. Exhibit F, (transcript of record, page 47,) from company's books shows this. Superintendant Fowler so testifies, transcript of record, page 37. Mr. Hubbell himself testifies that he was, during the entire period from the date to the maturity of the policy in suit, the collection agent of

the company at Monticello, Ill., the place of residence of the assured, and that he was entrusted with renewal receipts. Transcript of record, page 30.

Heron was furnished with renewal receipts for collection. Transcript of record, page 26.

The general agent, Koon, knew what Heron's custom was, and what he was doing. They talked together about it, and Koon agreed that Heron might mark the premiums paid when they were not paid.

"Ques.—When you told Mr. Koon that you were in the habit of marking some premiums as paid, that were not paid, what, if anything, did he say?"

"Ans.—I think he used about these words: 'All right, but be careful that they are good subjects.'" Transcript of record, page 30.

Besides this Mr. Heron collected and remitted over-due premiums, which were received without objection.

"Ques.—State whether Mr. Koon received those overdue premiums from you, and what, if anything, did he write or say concerning their collection after they became due?"

"Ans.—He received them. I don't know that he said anything, particular, unless they ran an unusual time." Transcript of record, page 27.

Mr. Hubbell, the other agent at Monticello, says:

"We received them whenever they were paid. We did receive them after they became due—from three days to more than two months after they became due. We remitted the premiums, after paid, to general agent at Chicago. We did not notify him when we received the money. He knew when they were due, and the remittance would show, within a day or two, the date of payment. * * * We had no instructions from the

general agent as to the collection of past-due premiums. There never was any objection made to the collection of past-due premiums. I collected over-due premiums after August 1st, 1876, and remitted them to A. G. Fowler, general agent, at Chicago. L. J. Weinstein is the name of a policy holder, whose premium was paid and remitted on the 19th day of October, 1877, which fell due July 29th, 1877. I did not require any certificate of health before accepting the premium. We were not instructed by the company or its agents to obtain certificates of health." Transcript of record, pages 30–31.

Surely these were agents with *cartes blanche*.

We think here is abundant evidence to show that both Heron and Hubbell had authority to waive, and that they did waive, to the knowledge of the company. Ins. Co. vs. Wolff, 95 U. S., 326. In Knickerbocker Life Ins. Co. vs. Norton, 96 U. S. 234, the practice of the company in receiving from their collecting agents over-due premiums, with knowledge of their payment after due, is competent to establish the fact of the agent's authority.

Plaintiff in error says this evidence should have been ruled out, "because it is entirely insufficient "to establish any custom, and does not appear to "have been known to the assured, or that he was "in anywise influenced by it." It never was a good objection to particular questions and answers, that they are not alone and of themselves sufficient to prove a fact; if they tend to prove the matter in issue the evidence is proper, as a party is not bound to prove his whole case at once, neither can he do so.

On the trial below we introduced copies of a

few pages of the company's books to show this custom, and that the company knew of its existence, and we here most earnestly invite the attention of the court to the same. They are exhibits B, C, D, E and F, transcript of record, pages 42–48.

The left hand column headed "date," is the date of the renewal—when the premiums are due. The words "reported in the month of," in exhibit B, right hand column, is an alteration since this suit was commenced. Mr. Doster's testimony, transcript of record, page 99. The right hand column of exhibit B, under "reported in month of," notwithstanding said alteration, shows when paid. Exhibits C and D have no dates fixed to the payment, so we cannot tell when premiums were paid. Exhibits E and F have a column showing the dates of payment—the right hand column but one. Now, examining the date when due at the left, compared with the date of payment at the right, it will appear at once, from exhibits E and F, that premiums were paid *as a rule*, long after due, and premiums paid at or before maturity were the exception.

Now as to the assertion, made under the second point in brief of plaintiff in error, that the insured was not shown to have known the general custom of receiving over-due premiums. W. G. Heron says:

"I had a conversation with Mr. Riddle, while I was agent of the company, in which I said to him that I would not be so particular with him as to a day, that I did not report, usually, till the first of the month, where I considered parties perfectly responsible. I was not so par-

ticular, I think I told him once that this company was not so strenuous as some companies I had known of, that I had sent in over-due renewal premiums, and they accepted them when the parties were all right. This conversation occurred while I was agent of the company. Transcript of record, page 27.

And further he says:

"I think he understood from myself that he could pay me over-due premiums, and the company would receive them." Transcript of record, page 28.

Add to this the fact that Jackson Riddle never paid but one premium at the date it was due, during the existence of his policy, but always paid without condition or objection after due, from 8 days to about 18 days (transcript of record, page 26), and it is clear that he knew this custom and relied on it, so far that he continually practiced it. Indeed the premium for the year before his death was paid by him through a draft to Supt. Fowler himself, at Chicago, on the 9th of October, just one year previous to the tender of the premium for 1876, as shown by the testimony in various places in the record, and evidenced by the receipts—exhibits A and D, transcript of record, pages 65–66.

If it was competent to show the custom of the company at all, and we think it was, surely such custom can be shown by any competent witness who knew such custom, and it would make no difference whether Jackson Riddle knew what any particular agent's custom was, provided he knew what was the company's general custom, that is knew the general fact. Of course reference must often be had to particular facts to establish a

general fact, upon the principle of inductive reasoning, but notice or knowledge in law, of the general fact, does not require notice or knowledge of each particular item of evidence by which that general fact is established. If Jackson Riddle knew the company had a general custom of receiving over-due premiums, it was not necessary that he should know the particular custom of every agency the company had, yet proof might be made by every agent the company had of his practice for the purpose of establishing the custom.

V.

The third point attempted to be made by plaintiff in error is that the testimony of L. D. Hawley, a bank cashier, as to the execution, contents and payment of a certain draft, was erroneously admitted, because as it says, said draft

"Does not appear from itself or any other evidence, to have ever been in possession or passed through the hands of defendant or any of its agents." Brief of plaintiff in error, page 29.

This is the draft by which, as defendants in error contend, the premium of 1875 was paid. It is for the exact sum due for premium of 1875. It is dated on the 4th of October, 1875. It is payable to the order of the insured, and endorsed to W. G. Heron, the person Mr. Riddle knew was the company's agent shortly before. It was enclosed in a letter to W. G. Heron, at Monticello, for the purpose of paying the premium.

Heron says: "Some time in September I received a draft from Mr. Riddle, made at Oxford, Ind., on some bank in Chicago, I don't know how; I think the amount of his premium. I mailed the draft, directed to the company at Chicago. The draft was made payable to my order. I sent it immediately after receiving it to the company in Chicago. Three or four days afterward I received it back again, they asking me to endorse it in blank and return it, and I endorsed it and returned it immediately. I had not endorsed it when I first sent it. Transcript of record, page 27.

Mr. Heron commits two immaterial errors in giving the month in which he received it, and in naming the place where payable.

Supt. Fowler testifies that he received a draft of this description in a letter from W. G. Heron, dated October 5, and he returned it in a letter dated October 7th, and received it back October 9th, with marginal note from Heron on same letter he (Fowler) had sent it in. Transcript of record, page 34. See also in connection with this, exhibit A, transcript of record, pages 40–41.

Exhibit E, from the books of the company (transcript of record, page 46), shows that on October 9th, 1875, Jackson Riddle paid the amount of this draft, as his full premium for 1875. Exhibits A and D (transcript of record, pages 65–66), being copies of the renewal receipts for 1875, and the letter of Mr. Fowler acknowledging receipt of this amount, in payment of said renewal, are dated October 9th, the day upon which Mr. Fowler received back from Mr. Heron, the endorsed draft.

All these facts, together with the fact that this draft was deposited in the First National Bank of

Chicago, the place of the company's agency, as shown by endorsement on the back, prove beyond a reasonable doubt that Supt. Fowler got the draft, and used it for the purpose sent—in payment of the renewal of 1875.

VI.

The fourth point attempted to be made by plaintiff in error (its brief, page 30), is that the court erred in admitting the testimony of Orne Templeton, Caroline R. Doster and Taylor Riddle, because they all detailed conversations at which neither the company nor any of its agents were present.

As for Templeton's testimony, it was withdrawn from the jury, by the court, on motion of the defendant below. Transcript of record, page 86.

Mrs. Doster's testimony was relative to an arrangement made with her by the assured, when he was leaving home, for her to inform his son, Taylor Riddle, who lived at a neighboring town, of the arrival of the notice of the amount of the premium of 1876, if any came, so that he, Taylor Riddle, could remit the money to the company. Transcript of record, pages 88–89.

The testimony of Taylor Riddle was concerning an arrangement made with him by his father, the assured, to pay the premium for 1876, in case notice concerning the same was received in his absence. Transcript of record, page 106.

The plaintiff in error says this was improper evidence, because the company's agent was not present

when the arrangement was made.

If this is not proper evidence, it would be impossible, in almost every case, to prove the employment of an agent for a specified purpose. If these witnesses could not testify to these facts, because the company's agent was not present when they occurred, then neither could Jackson Riddle, if alive, testify to the arrangement he had made for the payment of this premium; nor could any disinterested witness, who might have heard this arrangement made, so testify. Also, under the same absurd theory, if the whole matter had been written upon paper, and signed by the parties, it would not have been proper evidence, unless the company's agent was present at the writing and signing. Mr. Greenleaf in his work on Evidence says, vol. 1, sec. 123:

"There are four classes of declaration, which, though usually treated under the head of hearsay, are in truth original evidence: The first class consisting of cases where the fact that the declaration was made and not its truth or falsity is the point in question."

The fact in issue is this: Did Jackson Riddle make any arrangement to pay the premium for 1876? If he did, then it is clear that he did not intend to abandon and forfeit the policy. This being the issue, the best evidence of which the nature of the case will admit, is the evidence of those who were present and heard him make the arrangement for payment.

The authority of an agent, when that is the issue, may be shown by any one who heard it

conferred, no difference who was present or absent. As the authority in question was conferred orally, we cannot avoid giving the statements of the assured in conferring it.

This seems to us too elementary to require argument. The statement that the testimony of these witnesses was manufactured for the occasion, we dismiss with the observation that the jury and court below did not so think.

VII.

The fifth point attempted to be made by plaintiff in error (its brief, page 30,) is not well taken. We had a right to show that the books of the company had been altered since they were examined by Mr. Doster. The answer of Mr. Doster is not that the copies are not true copies, but that the copies are different from the books when he saw them. Mr. Doster commenced to examine the books in Chicago, preparatory to taking depositions. He began to make minutes of what he discovered upon the books, and the company's employes interrupted him, saying they could not allow him to make memoranda of the books, to testify in the case. Transcript of record, pages 99–100.

Mr. Fowler attached exhibit "B" (transcript of record, page 42,) as a true copy of the books, at the time he gave his deposition. Transcript of record, page 33. Prior to this, when Mr. Doster saw the books, it was different; hence it is clear

the books had been altered between times.

Taylor Riddle testified about the contents of the little printed slip that was pasted to the notice sent to Fowler, Indiana, October 4th, 1876, viz: "You "can pay this premium to A. G. Fowler, Chicago, or remit direct to this office. Transcript of record, page 106.

This is the same kind of paster mentioned by Supt. Fowler (transcript of record, page 38), as follows:

"I think there was a little paster on the notice, the same as they use at elections, stating 'you will find your renewal receipt at the bank of Piatt Hubbell & Co.'"

Mr. Doster had previously testified to the contents of this paster, without objection, showing it to be lost and beyond control of himself or plaintiffs. He had the bundle of papers with him in court and exhibited them, which papers he received from the plaintiff's former attorneys, in which the little slip was included when they were received.

The court, jury and counsel, could see it was not there. He then testified:

"That little slip of paper was loose among the others, not regarded by me as of any consequence, because I did not know really what was involved in the case, and I have no knowledge of where it is. It was doubtless thrown away by me, not expecting it to be of any importance; not knowing of what importance it was." Tratscript of record, page 100.

VIII.

If the sixth point attempted to be made by plaintiff in error (page 30, its brief), has anything

in it, that does not involve an utter disregard of the evidence, it is sufficiently met by the arguments, and quotations from the evidence, elsewhere made by us.

IX.

The seventh point attempted to be made by plaintiff in error (its brief, page 31), is bad for several reasons, and what we first say upon this seventh point, sufficiently answers all alleged errors in the refusal of all its instructions. Its counsel requested the court to charge the jury, in the following language, viz: "Whereupon the defendant moved the "court to specially charge the jury: first, * * * "second, * * * third, * * * " and so on down to and including the twelfth request. Then follows the exception, to-wit:

"The court refused to charge the jury in each and all of the above twelve requests of the defendant, to which refusal of the court the defendant then and there excepted and still excepts." Transcript of record, pages 124–125.

This request for instructions, and exception to the court's refusal, is on "all fours" with the case of Beaver vs. Taylor, *et al.*, 93 U. S., 54, where this court says:

"The entire series of propositions was presented as one request; and if any one proposition was unsound, an exception to a refusal to charge the series cannot be maintained."

The language used in the case at bar is just

the same as in Beaver vs. Taylor, *et al.*, except in the former it reads: "The court refused to "charge the jury in *each* and *all* of the above "twelve requests." In the latter: "The court "declined to so charge the jury on *either* and *all* "of said points as requested." The meaning is identical. U. S. vs. Hough, 103 U. S., 71; Boogher vs. Ins. Co., *Id.* 98.

In this case plaintiff in error has not had the hardihood to argue to the court that its 4th, 7th, 9th and 11th requests are law: hence error is not even assigned on the court's refusal to give them to the jury.

Plaintiff in error says that its second request

"Asked the court to tell the jury merely that if Jackson Riddle had *notice* that William Heron had no authority to waive prompt payment, it was sufficient to put him on his guard," &c.

It is true the policy and renewal receipts had printed on their backs a notice of the limitation of the agent's powers, but this notice is no part of the contract, and the instruction, if given, would have taken from the jury the question of fact, whether the assured did have notice.

The instruction asked was misleading, under the evidence, for "actions speak louder than words." The company denied its words by its actions. When there is conflict between words and actions, courts have greater regard for actions.

It is in vain the company says to its policy holders, "our agents have no right to do thus and

so," when in fact it suffers them to do the forbidden thing continually. Jackson Riddle, knowing these facts, had a right to rely on anything an agent would tell him, if such were in harmony with the company's practice.

X.

The eighth and ninth points attempted to be made by plaintiff in error (its brief, pages 32–33,) are completely answered in our argument on the fourth subject discussed by us, ante pages 17–21

XI.

The tenth point attempted to be made by plaintiff in error (its brief, page 33,) involves a proposition which is not law, if a party can found an estoppel or establish a waiver by a previous course of dealing, as this court has already decided can be done. Ins. Co. vs. Wolff, 95 U. S. 328.

XII.

The eleventh point attempted to be made by plaintiff in error (its brief, page 34,) is disposed of in the first part of our argument on our ninth subject. Besides, the instructions asked did not meet any issue in the case, and it is entirely disposed of by the verdict, for the court instructed the jury that

"If you find that the company or managing agent had not been notified of the change of the post-office address of the assured until about the said 4th day of October," &c., "you will find for defendant." Transcript of record, page 128.

Now, if the sending of the notice to the proper address was passed on by the jury at all, in arriving at their verdict, they must have found that the company was notified of the address of the assured, and the verdict cures any error in refusing to give this request, for the evident reason that if it had notice of his address, it had no *good* reason to believe Jackson Riddle's post-office was elsewhere, and it never pretended to have sent a notice to Oxford, Ind., his real address. It could have no reason to believe his address was different from that of which Heron had notified it, and where it had addressed him and found him on the 9th of October, 1875.

XIII.

The twelfth point attempted to be made by plaintiff in error (its brief, page 35,) is disposed of by the first point of argument made by us under our ninth subject of discussion.

In so far as it is material to discuss the question of law involved, it will be done in reviewing the instructions which were given, upon the consideration of which we now enter.

XIV.

The thirteenth point attempted to be made by plaintiff in error, under its thirteenth assignment of error is, that the Circuit Court erred in giving certain instructions to the jury, which instructions so complained of are fully set out in its brief,

pages 22–23–24, and are found in transcript of record, pages 125–126.

These instructions contain two propositions applicable to the case, preceded by the general statement of law, that an insurance company may by its dealings with an assured, waive a strict compliance with the express terms of a policy, as to time of payment of premiums.

The first paragraph of the instructions complained of, as a legal proposition, does not seem to be controverted by plaintiff in error, as, indeed, it could not well be controverted, it being precisely in the language of this court in the case of Ins. Co. vs. Wolff, 95 U. S., 330.

It is claimed that there was no evidence in the case upon which to predicate these instructions, and especially that there was no evidence of any custom of the company, to receive payment of premiums after the assured's death, but as this criticism is applicable to all the instructions given and complained of, we will pass it for the present and discuss it fully hereafter.

Another proposition in said instructions is as follows:

"Therefore, if you find from the evidence in this case that the defendant company was in the habit of sending renewal receipts for the premium on this policy to its local agent, Wm. G. Heron, at the place of residence of the assured, duly signed by the President and Secretary of the company, leaving their use subject entirely to the judgment of the local agent, and the same agent was accustomed to received from the assure, without objection, the premium on said policy several days after

the same became due, and issued the receipt therefor, and the home company, or the managing agents or officers, had full knowledge of such practice of the local agent, and received from its agent such premiums so received, and retained the same, the assured had a right to believe that the company waived a strict compliance, and you may find that there was a waiver by the company of the forfeiting clause of the policy; and if the assured, relying on such practice, within a reasonable or the usual time paid or offered to pay said premiums after the day the same was due, the said policy remained in full force and effect, and the company are liable thereon, notwithstanding the assured had died in the meantime."

If we correctly appreciate the force of counsel's criticism on this proposition, as stated in his brief, it amounts to a confession that had the assured been alive at the time the offer to pay the premium was made, then the law as given by the court in this branch of the instruction was correct; provided the facts upon which it is based were in evidence. In other words, counsel objects to this instruction on two grounds; first, because "it gives "the jury the case attempted to be made in the "pleadings, but not borne out by the evidence," and second, because it "tells the jury that under "the circumstances detailed, they can find for the "plaintiffs, notwithstanding the assured had died in "the meantime."

So far as the first objection is concerned, we will hereafter discuss it in connection with the similar objection hereinbefore and hereinafter referred to, for this objection is urged to all the instructions given and excepted to.

So far as the second objection is concerned (and

as above stated, it is made to the first proposition above quoted), we have this to say:

The law thus laid down by the trial court is fully sustained, not only by this court, but by the highest courts of all the States, where the principle involved has arisen and been decided.

Insurance Co. vs. Norton, 96 U. S. 234.

Insurance Co. vs. Wolff, 95 U. S. 328.

Miller vs. Life Ins. Co., 12 Wallace, 285.

Seamans vs. N. Western Mutual Life Ins. Co., 3 Federal Rep. 325.

Chicago Life Ins. Co. vs. Warner, 80 Ills., 410.

Home Life Ins. Co. vs. Pierce, 75 Illinois, 426.

Cotton States Life Ins. Co. vs. Lester, 62 Georgia, 247.

Mayer vs. Mutual Life Ins. Co., 38 Iowa, 305.

Thompson vs. St. Louis Mutual Life Ins. Co., 52 Mo., 469,

Mound City Mutual Life Ins. Co. vs. Huth, 49 Ala., 529.

Helme vs. Philadelphia Life Ins. Co., 61 Penn. St. 107.

Bowman vs. Agricultural Ins. Co., 59 N. Y., 521.

Hughes vs. Metropolitan R. R. Co., 1 Com. Pleas Div. 120. 16 English Rep. 466.

Viele vs Germania Ins. Co., 26 Iowa 10, and see note appended 69.

It is, however, insisted by plaintiff in error, that the well established principles of law in regard to waiver of forfeitures, as decided and illustrated by the foregoing cases, have no application to this

case, because the assured had died after the day when the premium of 1876 was due by the terms of the policy, and before said premium was paid, or the offer to pay the same made.

We have examined the "points" and the "argument" contained in counsel's brief for the reasons urged in support of this view, but have been unable to find them. On principle, to use a homely phrase, we do not see that this fact "cuts any figure" in the matter. The death of the assured fixed the liability of the company, and so far as this proposition is concerned, determined the obligation of the company to pay the beneficiaries named, unless there had been a forfeiture. If, up to the very moment of the assured's death, there had been a waiver of the forfeiture provided for by the terms of the policy, it is impossible for us to conceive how his death would operate, as a sweep of the sponge, to wipe out this waiver and all the legal consequences thereof.

The condition in the policy that the same should cease and determine, on the failure to make prompt payment of the premium, is for the benefit of the company, and the decisions are uniform that this, like all other conditions in contracts, may be waived by the party in interest. It is not and cannot be waived by the assured, or by any act of his. His death simply fixed the company's liability.

Instead of the assured and beneficiaries taking upon themselves the risk of death, it was the com-

pany which took such risk, and it agreed to pay to the beneficiaries the sum insured, upon the death of the assured, provided the policy had not in the meantime ceased and determined, by the failure to promptly pay premiums, and the decisions are that a waiver of this condition by the company, has the same legal effect as prompt payment, so long as the waiver continues.

In many of the above cited cases the propositions of law embraced in the court's instruction in this case were sustained, where the facts showed death had ensued, or the event insured against had happened, before payment was tendered.

Seamans vs. N. Western Mutual Life Ins. Co., 3 Fed. Rep., 327.

Chicago Life Ins. Co. vs. Warner, 80 Ills., 412.

Home Life Ins. Co. vs. Pierce, 75 Ills., 430.

Cotton States Life Ins. Co. vs. Lester, 62 Georgia, 247.

Bowman vs. Agricultural Ins. Co., 59 N. Y., 521.

Upon the last branch of the instructions complained of the record discloses that it does not constitute the whole of the court's instructions upon the subject, as it will be noticed by a glance at the record (transcript, page 128), that the converse of the proposition, the law as applicable to the theory of the defendant below, is given:

"But if you find from the evidence that it had not been the uniform custom of the company to send to the assured the said notice and statement at or about the time the premium became due, or if you find that the company or managing agent had not been notified of the

change of the post office address of the assured until about the said 4th day of October, or that the company had in reality sent such notice by mail or otherwise, at a prior date, properly addressed to the assured, then it was not the fault of the company that the assured was not notified, and the want of such notice would not excuse the assured from making payment when the premium became due September 20th, and the policy would become forfeited." Transcript of record, page 128.

The law embodied in the last branch of the instruction is well settled, and acquiesced in by all but the plaintiff in error.

Ins. Co. vs. Eggleston, 96 U. S., 572.

Seamans vs. Ins. Co., 3rd Fed. Rep., 325.

Ins. Co. vs. Pierce, 75 Ills., 426.

Mayer vs. Ins. Co., 38 Iowa, 304.

This brings us to the consideration of the main objection insisted upon by plaintiff in error, under its thirteenth assignment of error, see its brief, page 36–37. Counsel insists that the first branch of the instruction was error

"In that it submits to the jury the conduct of the defendant in its dealings with assured, and others similarly situated, when the evidence does not support any such theory,"

because there is no evidence of the approval of the company of such conduct, etc., with full knowledge of the facts, and no evidence that the assured ever knew of the conduct of the company toward any other policy holder.

So far as the evidence is concerned as to these several propositions, we here refer to what we have said upon this subject under our 4th subject herein. The evidence in the record as to the custom and

dealings of the company with the assured and others, and the knowledge of the company and of the assured is there sufficiently pointed out.

It is further claimed that the second branch of the instruction is erroneous because "it gives the "jury the case attempted to be made in the pleadings, but not borne out by the evidence."

That there was evidence introduced tending to show, and more than that, clear and convincing evidence of the habits of the company, of sending renewal receipts for premiums to its local agent, Heron, duly signed by its President and Secretary, leaving their use subject to the judgment of the agent, and such agent was accustomed to receive from the assured without objection, the premiums after they became due, and the managing agents had full knowledge of such local agent's practice, and received and retained such premiums, cannot be consistently disputed, and it seems to us to require more than average hardihood to assert the contrary.

Heron, the local agent, testifies that he was furnished the renewal receipts for the years 1872-73-74, by the general agent at Chicago, Illinois; that he collected the premiums for those years; that the same were collected and reported after the same were due, to the general agent, Koon; that said general agent received them without objection, and never did object unless they run an unreasonable time; that Koon accepted those which had run an unreasonable time, but required certificates of health;

and that he never required such certificate from Jackson Riddle. Transcript of record, pages 26–27. This evidence establishes every proposition of fact alluded to in the instruction.

It also appears that after Heron ceased to be agent (although that fact was unknown to assured), he received from assured, about October 4th, 1875, a draft of that date, for the premium due Sept. 20, 1875, and that the same was by him sent to the company's Superintendent, Fowler, received by him as payment for that premium October 9th, and thereupon Fowler sent the assured his receipt for that year. For draft, see plaintiff's brief, page 29. For Fowler's letter, see transcript of record, page 66.

If this testimony is not sufficient for the trial court to predicate an instruction to the jury upon, we would be pleased to be enlightened in that respect.

It is next claimed that the last branch of the instruction, relative to the defendant's custom of sending notices to the assured, of the amount due, time when and person to whom payment should be made, was not justified by the testimony. Its brief, page 37.

(a) The testimony of Fowler, the company's Superintendent, in reference to sending notices is:

"The custom of the defendant, concerning the sending of notices to policy holders at the same time of sending the renewal receipts to local agents for collection of the premiums, is hardly well established. In some cases we do it, and in other cases we do not do it. We have sent notices to policy holders that they would find their re-

newal receipts with certain local agents, in some cases. In others we have not. I believe we have never sent notices to policy holders in St. Louis and other points, thinking that the local agent would deal directly with the policy holders. In other cases we have sent notices to small places through the country; we generally send a notice that they will find their renewal receipts. * * We send notice that their premiums are due at a certain day at our office, giving the amount of the premium and the amount of cash to be paid. * * * I would be under the impression that to all the towns in this state we did send such notices almost if not universally." Transcript of record, page 38.

On pages 119–120–121–122, of transcript will be found set out in full the several statements sent by the general agent, Koon, to Jackson Riddle, relative to the premiums of 1872–73–74–75, with the notices attached, all showing the time when, the place where, and the person to whom said premium could be paid.

(b) That there was evidence showing that the company had notice of the post office address of Jackson Riddle, at time of sending notice of 1876, and that it neglected to send such notice until October 4th, and that the same did not reach the beneficiaries until October 6th, is clear from the following: At the time the premium due in 1875 was transmitted by Mr. Heron to Fowler, Superintendent of the company, the latter was informed by the former that Riddle's residence and post office address was at Oxford, Indiana. This is shown by the testimony of Wm. G. Heron:

Ques.—What time did Jackson Riddle leave this county [that is Piatt county, Ill.,] and where did he move?"

"Ans.—My impression is he left in March or April in

ment, and the envelope is post-marked "Chicago, "Oct. 4, 11 a. m., Ills," addressed to "Jackson "Riddlle, Esq., Fowler, Indiana." In regard thereto Taylor Riddle testifies that he received it at Fowler, Indiana, October 6th, and that there was a "paster" attached to it, in substance "you can pay "this premium to A. G. Fowler, Chicago, or "remit direct to this office." Transcript of record, page 106.

It is true as intimated by counsel in his brief (page 37), that Mr. Chase's testimony (page 92 of transcript), would indicate that at least two notices for 1876 had been received, because he testifies that he remembers seeing them among the papers handed him after assured's death, but Taylor Riddle says he handed all the papers to Chase that Chase had, and no such notice was among them.

"I handed all the papers to Mr. Chase, except this notice mailed in Chicago, October 4th, and the notices here are those which I took to Mr. Chase, except this one, which I mailed him afterward." Transcript of record, page 110.

This simply shows that these two parties do not recollect alike, and it was not for the court to usurp the functions of the jury, and determine the disputed fact, nor are we aware of any rule of law that compels us or the court to be bound by one witness' recollection, and instruct the law accordingly. On the contrary, we submit that it was a question of fact for the jury, under proper instruction, as to either view they might adopt, and this court will notice that the instruction given, as a

whole, covers both views (Transcript of record, page 128, commencing "Now I instruct you," about the middle of the page).

The fact that Mr. Chase is mistaken in stating (transcript of record, page 92,) that he saw on October 9th, 1876, notices from the company to Jackson Riddle, of the amount due for premium for 1876, is clearly established by the fact that in telegraphing to his agents in Chicago to make a tender of the amount of this premium, he did not inform them of said amount, *but instructed them to ascertain the amount from the company's agent*, (see his message, transcript of record, page 69,) and that his memory is very bad, or that he is capable of misstating the facts, is clearly shown by his statement (transcript of record, page 92,) that the notices which he saw were dated at or about certain dates, when the fact is, not one of the five notices in evidence, which includes the one for 1876, received October 6th, of that year, bears any date at all, and not one of the five envelopes which enclosed these notices are post-marked in September, or have thereon the year in which mailed, showing it was not the company's practice to date their notices, or the practice of the Chicago post office to stamp the year of mailing. See these notices and envelopes, transcript of record, pages 118 to 123.

XV.

As to the fourteenth assignment of error we say: 1st. That the portion of instruction assigned as

error was not, as it is there incorporated, objected to nor excepted to by the defendant below. It is taken from the instructions of the court given of its own motion, and found on pages 126 to 129 of transcript, and there is no objection to it as a whole or any part of it. U. S. vs. Hough, 103 U. S. 72. The only portion of the charge excepted to, is found at pages 125 and 126 of transcript, and is covered by the 13th assignment of error in counsel's brief, pages 22–23–24.

All we have to submit as to the correctness of the legal proposition set forth, is embraced under the last preceding subject herein.

XVI.

The fifteenth assignment of error that "the court "erred in overruling defendant's motion for a new "trial, filed in this case," is not well taken, for it is well settled that the rulings of the circuit courts on motions for new trial are discretionary, and are not reviewable in this court on writ of error.

Railway Co. vs. Twombly, 100 U. S., 78.
Boogher vs. Insurance Co., 103 U. S., 97–98.

XVII.

We come to the consideration of the sixth point attempted to be made by plaintiff in error in its brief, page 30. This involves in some cases a reference to evidence already quoted herein, but we will be brief.

The company is not in a condition to plead that

it was not its custom to receive over-due premiums, when it is shown in the evidence, that it was in the habit of sending its renewal receipts for collection, as in the case of Piatt Hubbell & Co., with a *carte blanche* as to their power and discretion to use them. Mr. Bickford testifies:

"Piatt Hubbell & Co. were a collecting agency, and I presume they were collecting agents for the company. I don't know of any contract that Mr. Fowler made with them. I don't know that he ever made any. I don't know of any appointment that the company has made. I *usually* sent out renewal receipts to the banks or to different collecting agencies for collection, and this man living at that place, I presume very likely I sent to them of my own accord." Transcript of record, page 70.

This puts the practices of the company in a very clear light. It shows that it took the money for premiums whenever it could get it, and did not stand upon the order of its taking.

That it was the custom of the company to send notices to policy holders, before their premiums were due, was proved by Mr. Bickford (transcript of record, pages 69–70) as follows:

"I send notices in the regular form, upon the receipt of the renewals from the company. They are received, usually, from the 20th to the 25th of the month previous to their being due. The first duty is finding out the residence, place them upon the renewal register, then send the notices. That usually takes from one to two days after the renewals are copied into the book or registered, and upon the day-book. Then they are sent to the different collecting agencies for collection. We keep an index of the residence of all the policy holders, and always *mean* to notify them of the time when their renewal premiums will become due."

In this company the premium for each year was

a varying amount. Jackson Riddle's total premium each year was $215.00. In 1872, of this premium $107.00 was paid by note, $108.00 in cash, with $12.84 interest on note; total cash due, $120.84. See exhibit B, transcript of record, page 42. In 1873, cash and note the same, interest $22.47; total cash due, $130.47. Exhibit C, transcript of record, page 43. In 1874, cash and note the same, interest $29.96; total cash due, $137.96. Exhibit D, transcript of record, page 44. In 1875, cash premium $135.45, interest $29.96, dividend $79.55; total cash due, $164.41. Exhibit E, transcript of record, page 46. In 1876, the same as 1875. The Secretary of the company testifies, page 72 of transcript—

"The general meaning of the expression 'half note plan,' has been that the first four premiums on any policy issued on that plan should be paid one-half by notes. Upon the fifth payment such dividend as could be afforded was to be applied to the reduction of the full premium,"

but exhibit D, transcript of record, page 44, shows Mr. Riddle was entitled on the fourth payment, to a dividend of $1.00.

This shows that it was impossible for Jackson Riddle to have told how much was due, as premium on his policy for the year 1876, without procuring the information from the company itself, as it was a matter peculiarly within the knowledge of the company.

The company had not elected to insist upon the forfeiture clause in said policy, until long after the

assured had died, and the rights of the parties were fixed. When Mr. Blair went to the Superintendent's office on October 9th, 1876, to make payment or tender of the premium due September 20th, 1876, he called on Mr. Bickford, the company's cashier and book-keeper, and the following conversation occurred: (Transcript of record, page 67.)

"I asked the book-keeper if he would receive the premium now, and the book-keeper replied, 'Yes, if paid now.' * * I then replied to him, 'the man is dead.'"

The renewal receipt was then and there produced. They then refused to receive it. Mr. Blair went away, to get a witness to the tender, and while he was gone Superintendent Fowler, if he is to be believed, resorted to the small but ineffectual trick of marking the renewal receipt, "forfeited by non "payment," and enclosing it in a letter to the Secretary at Hartford, and posting the letter, so that it might be out of his hands when Mr. Blair returned with his witness to the tender, and thereby to abdicate, as he conceived, his own authority to receive the tender, as well as to put it out of the power of Blair to make one, because the rules of the company allowed payment to be made to no one, except those holding the renewal receipts. Fowler's letter, transcript of record, page 51.

The notices sent up to and including the 4th of October, demanding payment of this premium, show that the company, up to the sending of the last one, had concluded to waive a forfeiture, and

the last notice sent on October 4th, addressed to Jackson Riddle, at Fowler, Ind., had a little paster attached to it, stating that the assured might make payment to Fowler, at the Chicago office. Transcript of record, pages 100–106. This letter was received by Taylor Riddle, at Fowler, Ind., on the 6th, about 3 o'clock, and according to a previous arrangement with his father, for him to pay it, he assented to the proposition contained in said notice before his father's death, which was about 6 o'clock in the evening of the same day, (transcript of record, page 108) and he took such steps (this being Friday, and his father being killed that evening), as to make the tender on Monday, having attended his father's funeral on Saturday. Transcript of record, pages 106–108.

We claim that this notice was an offer to the assured and the beneficiaries, to accept the premium if paid within a reasonable time after the offer was received, and the proposition having been assented to by one authorized in the life-time of the assured, and who by virtue of being a beneficiary himself was entitled to make payment without such authority, and tender of performance having been made within a reasonable time, it was too late for the company to recall its proposition, and as a matter of fact it especially assented to it, until the fact of death was known.

Miesell vs. Globe Mutual Ins. Co., 76 N. Y., 115.

See concurring opinions of Justices Dickey and Sheldon, Ins. Co. vs. Pierce, 75 Ill., 426.

Upon principle the forfeiture clause in a policy of life insurance should be construed, where there has been a repeated disregard of the same by the parties thereto, like an article in a partnership agreement, which has not been acted upon by the parties, or where they have repeatedly acted in contravention of its terms. In such cases it has always been held, that such disregard of the partnership agreement amounts to a new agreement not to abide by its terms, for the evident reason that the law does not require such agreement to be in writing, therefore it may be changed by parol. Neither does the law require an agreement of life insurance to be in writing. Bliss on Life Insurance, second edition, section 136. Such waiver or new agreement may always be shown by acts, mutually assented to, inconsistent with the written agreement. In law, such contradictory acts can be construed in no other way than as an abrogation entirely, or a waiver *pro hac vice* of the written agreement.

Every time the assured agreed to pay and did pay over-due premiums, and the company, by its agents, agreed to receive and did receive such over-due premiums, there was an abrogation of the forfeiture clause, *pro hac vice*, or forever. Repeated acts of this kind will totally abrogate any inconsistent written partnership article, and why should it not do so with an insurance policy?

The expression "time is of the essence of the "contract" is not found in the policy *in haec verba*.

but is a matter of legal construction entirely. The parties to such policy have construed its provisions as to time of payment, as not of the essence of the contract, and therefore a rule of construction is furnished for the court which it must follow.

Chitty on Contracts, *90.

Wilcox vs. Bowles, 1 La. An., 230.

Panott vs. Wikoff, 1 La. An., 232.

"The provisions agreed upon, whether orally or in writing, may be waived by them, or modified in any way they please, and courts of equity will sometimes imply such waiver or modification from facts. Thus it is an established rule that provisions in the articles which the partners have never acted upon, but for a sufficiently long time have wholly disregarded, will be considered as expunged. * * * If the silence or non-observance be brief, but these are strengthened by acts of the partners, opposite in their nature and effect to those provisions, and not to be reconciled with any regard to them, the same inference will be made." Parsons on Partnership, second edition, 549.

We submit the case.

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